(1)

91-1400
NO.

Supreme Court, U.S.
FILED
FEB 27 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

U.S.A. MCDONALD CORPORATION, d/b/a NORCO PRODUCTS, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH JOEL HABER

Law Office of Kenneth Joel Haber, P.C.
17033 Briardale Rd.
Rockville, Maryland 20855
(301) 670-0016

Counsel of Record

February, 1992

QUESTION PRESENTED

Does a court of appeals err when it affirms through an enforcement order the National Labor Relations Board's granting of summary judgment if the Board refuses to permit an evidentiary hearing as to the extent of proper rather than improper layoffs and fails to present any evidence to controvert the employer's showing of an historic proper seasonal basis for layoffs?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	3
PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

Page

Holo-Krome v. National Labor Relations Board, 947 F.2d 588 (2d Cir., 1991).....13

National Labor Relations Board v. Red-More Corp., 418 F.2d 890 (9th Cir., 1969).....12

National Labor Relations Board v. Retail Clerks International Association, 186 F.2d 371 (9th Cir. 1951).....21

National Labor Relations Board v. Transpor Management Corp., 462 U.S. 393 (1983).....

National Labor Relations Board v. W.S. Hatch Company, Inc., 474 F.2d 558 (9th Cir., 1973).....12

Statutes:

National Labor Relations Act, as amended (29 U.S.C. 151 et seq.):

Section 8(a)(1) (29 U.S.C. 158(a)(1)).....5

Section 8(a)(3) (29 U.S.C. 158(a)(3))...5,6

Section 8(a)(5) (29 U.S.C. 158(a)(5)).....6

Section 10(e) (29 U.S.C. 160(e)).....3, 10

Section 10(f) (29 U.S.C. 160(f)).....10

20 U.S.C. 1254 (1).....3

NLRB Cases:

F. W. Woolworth Co., 90 NLRB 289 (1950)...7-8,12

Miscellaneous:

Rule 10.1 (a), United States Supreme Court Rules.....19

Rule 16, Fed. Rules of Appellate Procedure....10

Rule 40, Red. Rules of Appellate Procedure....10

Section 102.54, NLRB Rules and Regulations....16

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

U.S.A. MCDONALD CORPORATION, d/b/a NORCO PRODUCTS, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner U.S.A. McDonald Corporation[1] respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on September 11, 1991.

OPINIONS BELOW

---

[1] Petitioner U.S.A. McDonald Corporation, d/b/a NORCO Products, has no parent companies or subsidiaries to list pursuant to Rule 29.1.

On November 29, 1991, the Court of Appeals for the Ninth Circuit issued an order, reprinted in the appendix hereto, p. 98a, infra, denying a petition for rehearing of its September 11, 1991, Order, p. 1a, infra. Each of these orders was designated not for publication.

On September 11, 1991, the Court of Appeals issued an Order, p. 1a, infra, enforci supplemental decision and order of the Nationa Labor Relations Board ("Board") issued on August 28, 1990, U.S.A. McDonald Corporation d/b/a NORCO Products, 299 NLRB No. 93 (No. 2 D&O), p. 86a, infra, which had affirmed the Board's supplemental decision granting partial summary judgment on February 23, 1990, p. 71a, infra. On March 23, 1990, the Board denied Petitioner's Motion for Reconsideration, p. 83a, infra.

The Court of Appeals ordered enforcement, by its judgment of November 7, 1988 (referred to in Board documents as a judgment dated December 1, 1988, the date that a certified copy was transmitted by the Court of Appeals to the

Board) (No. 88-7284), p. 3a, infra, of the Board's order of May 31, 1988, 288 NLRB 1416, Board Case Nos. 19-CA-18986 and 19-CA-19184.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1991. The Court of Appeals denied on November 29, 1991, a petition for rehearing which was timely filed by petitioner in accordance with an extension of time for filing granted by the Court of Appeals on October 23, 1991.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act ("Act"), 29 U.S.C. 160(e).

PROVISIONS INVOLVED

National Labor Relations Act, as amended (29 U.S.C. 151 et seq.):

Section 8(a)(1) (29 U.S.C. 158(a)(1))

Section 8(a)(3) (29 U.S.C. 158(a)(3))

Section 8(a)(5) (29 U.S.C. 158(a)(5))

Section 10(e) (29 U.S.C. 160(e))

Section 10(f)(29 U.S.C.160(f))

Rule 16, Fed. Rules of Appellate Procedure

STATEMENT OF THE CASE

This case concerns an employer that was found by the Board to have established a history of seasonal layoffs and to have established business justification for the specific layoff. January 12, 1988, Decision of Administrative Law Judge, pp. 44-45a, infra. In pro se pleadings, pp. 110-117a, infra, the employer sought to controvert the General Counsel as to the Board's Backpay Specifications, p. 99a, infra. The issue presented is whether a court of appeals errs when it affirms through an enforcement order the National Labor Relations Board's granting of summary judgment if the Board refuses to permit an evidentiary hearing as to the extent of proper rather than improper

layoffs and fails to present any evidence to controvert the employer's showing of an historic proper seasonal basis for layoffs.

It involves what standards are applicable for such an employer with a legitimate past practice of seasonal layoffs to meet its burden of raising an issue of material fact sufficient to preclude an award by summary judgment of backpay as if all of the laid off employees had been dismissed on improper grounds.

The petitioner is an employer against which a local union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed charges which were the subject of Board investigation, complaint, hearing and a determination of violations of section 8(a)(3) or 8(a)(1) of the Act as to employer motivation.

The initial determination in this matter was the Administrative Law Judge ("ALJ") decision of January 12, 1988 ("1/12/88 ALJ Dec."), p. 14a, infra, which found, 1/12/88 ALJ

Dec., p. 11, lns. 11-14, p. 44a, infra:

> Respondent [Petitioner] has in the past had seasonal layoffs in the spring. Respondent does have business justification for a layoff and there is nothing to suggest that the Respondent would not ordinarily have had a spring layoff. However, Respondent has not adequately explained the extent of its layoffs.

Moreover, the ALJ found that there was "no evidence that the managers did, in fact, utilize union considerations in making this decision" (as to whom to lay off). 1/12/88 ALJ Dec., p. 11, lns. 3-4, p. 43a, infra. The ALJ continued that "the difficult question of determining the identity of the employees to whom a remedy is owed would normally be left to the compliance stage." 1/12/88 ALJ Dec., p. 11, lns. 25-27, p. 45a, infra. "However," he then determined that the remedy "for the 8(a)(3) violation is incorporated in the 8(a)(5) remedy" due to the company's failure to negotiate. See 1/12/88 ALJ Dec., p. 11, ln. 31, p. 45a, infra. He then determined: "All employees laid off on March 6, 1987 will be made whole ...." 1/12/88 ALJ Dec.,

p. 11, ln. 32, p. 45a, infra (emphasis added).

The question left open at that portion of the decision was what is meant by being made whole when seasonal layoffs based upon economic justifications regularly occur as a condition of employment in the employer's business. The ALJ made clear at the onset that the "burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 1/12/88 ALJ Dec., p. 10, lns. 12-14, p. 40a, infra. To determine what the ALJ meant by being made whole, we must turn to the remedy section of the decision.

Under the remedy section the ALJ held that "Respondent shall be ordered to make the 14 employees whole for any loss in earnings ... they may have suffered by reason of the layoffs in accord with the Board's decision in F. W. Woolworth Co., 90 NLRB 289 (1980) [sic, 1950]

..." 1/12/88 ALJ Dec., p.15, lns.10-13,[2] p.56a, infra. The F. W. Woolworth Co. decision held that the public interest required that "we seek to bring about, in unfair labor practice cases 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" F.W. Woolworth Co., 90 NLRB 289, 292 (citing Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 194 (1941)) (emphasis added). The Board thereafter held, F.W.Woolworth Co., 90 NLRB 289, at 292-293, that:

> [W]e shall order in the case before us and in future cases, that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of a proper offer of reinstatement. (Emphasis added.)

The remedy is available for only the period of discriminatory action. Petitioner and each of Petitioner's sixteen employees herein were entitled to a determination as to payment for

---

[2]It is this remedy which the Court of Appeals decreed as appendix A of its November 7, 1988 Judgment.

his/her loss of pay for any period of discriminatory action with respect to that employee.

The January 12, 1988, ALJ decision was affirmed by the Board's May 31, 1988, decision and order (288 NLRB No. 151). The Board petitioned for enforcement of its order by the Court of Appeals. The Court of Appeals granted enforcement of that order by its judgment of November 7, 1988 (referred to in Board documents as a judgment dated December 1, 1988), p. 3a, infra.

The Board in a Supplemental Decision and Order granted partial summary judgment on February 23, 1990, p. 71a, infra. On March 23, 1990, the Board denied Petitioner's Motion for Reconsideration. Another Supplemental Decision and Order of the Board was issued on August 28, 1990 (No 2 D&O), 299 NLRB No. 93, p. 85a, infra. The Board petitioned the Court of Appeals for enforcement.

Jurisdiction of the Court of Appeals was

invoked under sections 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f), as to the Board's petition for enforcement and under section 10(f) of the Act, 29 U.S.C. 160(f), as to petitioner's cross-petition.

Petitioner U.S.A. McDonald Corporation petitioned pursuant to Rule 40, Fed. Rules of Appellate Procedure, for a rehearing, seeking as relief that the matter be remanded back to the Board for the preparation and filing of a supplemental record pursuant to Rule 16, Fed. Rules of Appellate Procedure.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the September 11, 1991, Order of the Ninth Circuit Court of Appeals , p. 1a, infra, violates applicable standards of this Court, other Courts of Appeals and even its own previously enunciated standards. The court's order was denoted as not being for publication but that does not justify such a departure from acceptable standards.

The partial summary judgment granted on February 23, 1990, by the Board below, p. 71a, infra, was erroneously granted as a matter of law due to the existence of a dispute of material facts and the failure of the government to meet its burden of proof under the standards enunciated in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Board's initial May 31, 1988, order, p. 66a, infra, was erroneously applied by the Board in the issuance of its last order (August 28, 1990, p. 85a, infra) as a result of its erroneously granting of said summary judgment. This erroneous application was affirmed by the Court of Appeals Order filed September 11, 1991, when the Court of Appeals granted enforcement.

It must be noted that no evidence nor supporting evidentiary affidavit was presented in the partial summary judgment motion by the Regional Director, pp. 152a, infra, as to which employees were treated in what improper manner; i.e., which of the sixteen were improperly laid off and for what improper period of time. (An

affidavit was submitted, pp. 162a, infra, which recounted procedural events.) Under Woolworth, 90 NLRB 289, supra, at 292, such a determination is necessary in order to obtain "'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" While the burden, of course, is upon the employer at an actual evidentiary hearing, the Regional Director, through counsel, only made unsupported assertions in his motion for partial summary judgment and in his Backpay Specification as to such damages but, at no time, did he submit any evidentiary support to justify same, pp. 154a, 162a, infra.

The Ninth Circuit, in the past, has accepted the use by the Board of summary judgments but even then it was restricted to situations when no material factual issues existed, National Labor Relations Board v. W.S. Hatch Company, Inc., 474 F.2d 558 (9th Cir., 1973); NLRB v. Red-More Corp., 418 F.2d 890, 892 (9th Cir., 1969). Thus, the Petitioner is entitled to an evidentiary hearing as to the material facts in dispute. This entitlement is affirmed in other Court of Appeals decisions

such as the Second Circuit's recent decision in Holo-Krome v. National Labor Relations Board, 947 F.2d 588 (2nd Cir., 1991).

The question becomes what was in dispute once the Regional Director filed his Backpay Specifications on January 5, 1989. It must be respectfully urged, contrary to the denials contained in the Board's March 21, 1991, Brief submitted to the Ninth Circuit Court of Appeals[3], that the Petitioner did raise

---

[3] On pages 15-16 of said Brief, pp. __a, infra, the Board represented:

> Neither in its answer to the backpay specification nor anywhere else--including its brief to this Court-- has the Company attempted to attack the General Counsel's gross backpay computations by identifying any particular employee or employees who might be entitled to less backpay by virtue of allegedly legitimate organizational or operational needs that would have led to those particular employees being laid off for some portion of their respective backpay periods even in the absence of the Company's unfair labor practices. Such an allegation would have been a typical affirmative defense to the backpay specification. See NLRB Casehandling Manual (Part

challenges to the General Counsel's computat of backpay by identifying employees who were entitled to less backpay "by virtue" of "legitimate organizational and operational needs that would have led to those particular employees being laid off for some portion of their respective backpay periods even in the absence of the Company's" Board-asserted "unfair labor practices" (Board's March 21, 1991, Brief, p. 15. See footnote 3, supra).

The Board decided in its February 23, 1990, Supplemental Decision and Order, p. 4, p. 78a, infra, "to construe Respondent's correspondence, including its motion to dismiss, as a timely filed answer." The affidavit of the Counsel for the General Counsel dated February 14, 1989, in support of the Board's motion for summary judgment, listed the various correspondence involved and specifically asserted that "Respondent has still failed to file any answer to the Backpay Specification beyond the general denials contained in the body of letters to the

---

Three) Compliance Proceedings, Section 10742 (1989).

Regional Attorney referenced above." Affidavit, p. 5, p. 168a, infra.[4] However, the Petitioner did, in specificity, challenge each and every allegation of the Regional Director.

It must be respectfully noted that the above referenced assertion by Counsel for the General Counsel is an incorrect characterization (as general denials) of the contents of the letters filed by Petitioner. Furthermore, these letters must also be construed in the context that they, in addition, with the Petitioner's "motion to dismiss" were accepted by the Board as Petitioner's timely filed answer. February 23, 1990, Supplemental Decision and Order, p. 2, n. 4, p. 74a, infra, and p. 4, p. 78a, infra. Counsel classified the contents of document "h",

---

[4] It must be noted that in this affidavit there was no assertion of any factual nor evidentiary basis to establish the correctness of the Regional Director's Backpay Specifications. Second, it must be noted that the Regional Director had not filed nor has he filed any other document containing any evidentiary basis to conclude the correctness of the subject Backpay Specifications. Thus, it cannot be claimed by the Board that the Board has, through competent evidence, placed a material fact in dispute which the Respondent has failed to challenge.

Petitioner's January 26, 1989, letter to Mer cited in his affidavit, as a "general denial of the Specification." Affidavit, p. 3, para. h, p. 165a, infra. This must be considered an erroneous description of the contents of that document. Starting on page 6 of the January 26, 1989, letter to Mercer and concluding on page 8 of the subject letter, pp.129-135a, infra, this Petitioner, in detail, denied all allegations contained in the Backpay Specification filed on January 5, 1989. Petitioner concluded on page 8 of its January 26, 1989, letter to Mercer, p. 134a, infra:

> NORCO PRODUCTS hereby denies: 1. all backpay claims made against this company, 2. and denies appropriateness of the rational, etc. and case law which has been applied to support such backpay claims. 3. and NORCO PRODUCTS hereby includes by amendment, section 102.54 of the Board's Rules and Regulations and per such rules specifically denies any and all allegations of liability in the backpay specification filed January 5, 1989, against this company. (Emphasis added).

The detailed bases for these specific denials are contained in the preceding pages 6 and 7 of that letter, pp. 122-133a, infra. While not as artfully drawn as counsel would have, the

essence of these denials may be described as follows. On page 6, p. 130a, infra, Petitioner denied the appropriateness of the Backpay period asserted by the Regional Director (see para. numbered 1). On pages 6-7 , p. 131a, infra (see para. numbered 2), Petitioner denied the identity of the alleged discriminatees and challenged if they were damaged and the extent of damage. On page 7, p. 131a, infra (see para. numbered 3), Petitioner denied payment obligation to temporary employees because they were laid off when no further work was available. On page 7, p. 132a, infra (see para. numbered 4), Petitioner denied obligation to regular employees because those who were laid off were in fact those who should have been laid off on the basis of work availability. On page 7, p. 133a, infra (see para. numbered 5), Petitioner denied payment obligation to employees Chapdelaine and Bauer who had been specifically set apart by the Regional Director from the other employees in the Backpay Specification. A specific rationale was set out as to each of these denials and, yet, the Counsel to the General Counsel did not deal with

these rationales but, rather, incorrectly characterized them as general denials. Counsel thereby obscured the issues and denied Petitioner an opportunity to litigate them.

Similarly, the Petitioner additionally denied in specificity the Backpay Specifications in its February 16, 1989, pro se Motion to Dismiss, pp. 137a, infra, which was addressed to the Court of Appeals but was incorporated by Petitioner on p. 1 of its Motion to Dismiss Backpay Specification and Objection to Motion For Partial Summary Judgement [sic] addressed to the Board, which was also dated February 16, 1989, pp. 148a, infra. In the incorporated Motion to Dismiss, addressed to the Ninth Circuit Court of Appeals, Petitioner specifically asserts, p. 5, p. 145a, infra, (para. numbered 5) that "the factual record demonstrates surplus labor before and after the layoffs and that all employees were laid off and recalled per past practice regardless of recall provision." (emphasis added). In Petitioner's January 25, 1989, letter to Mercer, pp. 110a, infra (document (g) in Counsel's affidavit), the Petitioner definitively asserted the seasonality

of its employment practices for both seasonal and regular employees (para. 5 p.1- para.3 p. 2), pp. 111-113a, infra.

On the foregoing record, the Board erroneously granted the Regional Director a partial summary judgment, p. 71a, infra, which the Board subsequently relied upon to issue its final order, August 28, 1990, p. 85a, infra, which the Court of Appeals affirmed in its September 11, 1991, enforcement order, p. 1a, infra, which was issued not for publication.

While such a decisional delineation may preclude the September 11, 1991, Order of the Court of Appeals from being construed as being in conflict with other Circuits for the purpose of Rule 10.1 (a) of this Court, the September 11, 1991, Order itself violates applicable standards of this Court as well as the other Circuits.

Administrative deficiencies and defects arise when an agency is not required to establish, by evidence or a sworn evidentiary affidavit, its basis for its administrative determinations if taken by summary judgment. Evidence of such defects was provided by the

Board itself when its compliance officer sent to Petitioner's counsel on January 22, 1992, a letter, pp. 173a, infra, demanding payment of the backpay award which was ordered enforced by the Court of Appeals. However, with his demand letter, the compliance officer provided as its Appendix A a chart of Owed Backpay and Interest, p. 176a, infra. This chart denoted that the subject employees were entitled to payment and interest for the period of January and February of 1987, but t[illegible]'s Backpay Specification, p. 99a, infra, provided for periods commencing in March of 1987. Such inconsistences arise when no one is required to accept the responsibility to substantively swear in support of a motion for summary judgment.

CONCLUSION

Because there exist material factual issues in dispute, because the partial summary judgment was erroneously issued, even though the Petitioner specifically raised the affirmative defense of organizational and operational needs specifically noted by the Board in its March 21,

1991 brief, to the Court of Appeals, p. 15, p. 170a, infra, and due to all of the foregoing, a supplemental record should have been ordered to be prepared and filed under Rule 16(b), Fed. Rules of Appellate Procedure, so that the Court of Appeals could have considered all the relevant facts and issues prior to making its determination as to its enforcement order. This procedure has long been approved and used by the Ninth Circuit Court of Appeals, National Labor Relations Board v. Retail Clerks International Association, 186 F.2d 371 (9th Cir. 1951). However, the Court refused to apply it in this case, in contravention of the applicable standards which are required by the Supreme Court as to such summary judgments.

Wherefore, Petitioner respectfully prays that this Honorable Court grant its petition for a Writ of Certiorari and that this matter be remanded back to the Ninth Circuit Court of Appeals with instructions to have the Board prepare a supplemental record. Such a supplementation of the record should provide for documentation of economic justifications for each of the subject layoffs and to document

which if any employees were injured as a result of improper conduct by Petitioner and the amount of damages suffered by said employees.

Respectfully submitted,

February, 1992

Kenneth Joel Haber, Esq.
Law Office of Kenneth Joel Haber, P.C.
17033 Briardale Rd.
Rockville, Maryland 20855
(301) 670-0016
Counsel for the Petitioner

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

U.S.A. MCDONALD CORPORATION, d/b/a NORCO PRODUCTS, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

KENNETH JOEL HABER

Law Office of Kenneth Joel Haber, P.C.
17033 Briardale Rd.
Rockville, Maryland 20855
(301) 670-0016

Counsel of Record

February, 1992

APPENDIX

TABLE OF CONTENTS

		Page
A.	Order of the United States Court of Appeals for the Ninth Circuit dated September 11, 1991	1a
B.	Order of the United States Court of Appeals for the Ninth Circuit dated November 7, 1988 (No. 88-7284)	3a
C.	January 12, 1988, Decision of Administrative Law Judge, NLRB . . .	14a
D.	Board's order of May 31, 1988 (288 NLRB No. 151), 288 NLRB 1416, Board Case Nos. 19-CA-18986 and 19-CA-19184 . .	66a
E.	Board's supplemental decision granting partial summary judgment, February 23, 1990	71a
F.	March 23, 1990, Board denial Petitioner's Motion for Reconsideration	83a
G.	Supplemental decision and order of the National Labor Relations Board issued on August 28, 1990, adopting ALJ Supplemental Decision issued on May 2, 1990, U.S.A. McDonald Corporation d/b/a/ NORCO Products, 299 NLRB No. 93 (No. 2 D&O)	85a
H.	Order of the United States Court of Appeals for the Ninth Circuit dated November 29, 1991, denying petition for rehearing of its September 11, 1991, Order	98a
I.	January 5, 1989, Backpay Specification and Notice of Hearing	99a
J.	March 2, 1990, Amendment to Backpay Specification and Notice of Hearing .	106a

K. Petitioner's Pro Se Letters and Pleadings to NLRB (selected documents):

(1) January 25, 1989, Letter to Walter J. Mercer, Regional Attorney, NLRB 110a

(2) January 26, 1989, Letter to Walter J. Mercer, Regional Attorney, NLRB 117a

(3) Petitioner's February 16, 1989, pro se Motion to Dismiss, addressed to United States Court of Appeals for the Ninth Circuit 137a

(4) Motion to Dismiss Backpay Specification and Objection to Motion For Partial Summary Judgement [sic], addressed to NLRB, dated February 16, 1989, with certificate of service on March 1, 1989 . . . . . 148a

L. Motion for Partial Summary Judgment Upon a Backpay Specification, filed by Counsel for General Counsel to NLRB, dated February 14, 1989 . . . . . 152a

M. General Counsel's Memorandum in Support of Motion for Partial Summary Judgment, dated February 14, 1989 . . . . . 154a

N. Affidavit of James C. Sand, Counsel for the General Counsel, dated February 14, 1989 (exhibits omitted) in support of motion for partial summary judgment 162a

O. Board's March 21, 1991, Brief to the United States Court of Appeals for the Ninth Circuit (No. 90-70612), pp. 15-16 . . . . . 169a

P. Demand letter from Raymond D. Willms, Compliance Officer, NLRB, to Kenneth Joel Haber, Esq., Counsel to Petitioner, dated January 22, 1992, with its Appendix A, Owed Backpay and Interest 173a

Q. Provisions Involved:

(1) National Labor Relations Act, as amended (29 U.S.C. 151 et seq.):

(a) Section 8(a)(1), (3), and (5), as amended, 61 Stat. 140, as codified in 29 U.S.C. 158 (a) (1), (3), and (5) (in relevant part) 177a

(b) Section 10(3), as codified in 29 U.S.C. 160(e) 178a

(c) Section 10(f), as codified in 29 U.S.C. 160(f) 181a

(2) Rule 16, Federal Rules of Appellate Procedure 184a

APPENDIX A - Order of the United States Court of Appeals for the Ninth Circuit Dated September 11, 1991

FILED, SEP 11 1991
Cathy A. Catterson, Clerk
US Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No. 90-770612
v.	)	NLRB No. 19-CA-18506
USA MCDONALD CORPORATION, d/b/a NORCO PRODUCTS, Respondent.	)	ORDER*

On Application for Enforcement of an Order of the National Labor Relations Board
Submitted** September 9, 1991
Seattle, Washington

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

The Board's Compliance order is well supported by substantial evicence and it will be enforced. Norco's cross-petition is dismissed.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.
enforced. Norco's cross-petition is dismissed.

Appendix A

This Court's order of December 1988 awarded judgment to the Board and is the law of the case. It established that Norco is responsible for unfair labor practices. Norco's subsequent delaying actions have gained it nothing and its arguments on appeal are without merit.

ORDER ENFORCED.

APPENDIX B - Order of the United States Court of Appeals for the Ninth Circuit Dated November 7, 1988 (No. 88-7284)

Filed, NOV 07, 1988
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 88-7284
USA MCDONALD CORPORATION d/b/a NORCO PRODUCTS, Respondent.	)	

JUDGMENT

Before:

THIS CAUSE was submitted to this Court upon an application for enforcement of an order of the National Labor Relations Board dated May 31, 1988 against Respondent, USA McDonald Corporation d/b/a Norco Products, Missoula, Montana its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No's. 19-CA-18986 and 19-CA-19184. The Respondent having failed to file an answer within the time provided by the rules of the Court, the Board on August

31, 1988, mailed to this Court a motion for judgment by default under Rule 15(b) of the Federal Rules of Appellate Procedure. This Court issued an order granting said motion on _____. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, USA McDonald Corporation d/b/a Norco Products, Missoula, Montana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing and failing to bargain collectively in good faith with the onion as the exclusive collective bargaining representative of Respondent's unit employees, by laying off unit employees without first affording the Union a reasonable opportunity to bargain about such layoffs.

(b) Discriminating against employees in regard to layoff or recall from layoff in order to discourage membership and activities on behalf of International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and helpers of America, Local Union No. 2, or any other labor organization.

(c) Threatening employees with closing or selling the business, loss of benefits, miserable working conditions, layoff or loss of employment or any other form of retaliation for engaging in union activities or for engaging in activity protected by Section 7 of the National Labor Relations Act (hereinafter called the Act).

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

a) Make whole all 14 bargaining unit employees laid off on March 6, 1987 for any loss of pay they may have suffered as a result of the unlawful layoff, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," attached hereto as Appendix A.

(b) Make whole Joseph Bauer and Richard Chapdelaine for the discriminatory delay in recalling them from layoff in July 1987, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," attached hereto as Appendix A.

(c) Expunge from its files any reference to the layoffs of the employees described in subparagraph (a) above, and notify each of them that this has been done and that evidence of such unlawful layoff will not be used as a basis for future personnel actions.

(d) Expunge from its files any reference to the delay in recalling Bauer and Chapdelaine from layoff, and notify each of them in writing that this has been done and that evidence of this unlawful delay will not be used as a basis for future personnel actions against him.

(e) Preserve and make available to the Board or it's agents all payroll and other records necessary to compute the backpay

rights set forth In the section of the Administrative Law Judge's Decision entitled "The Remedy," Attached hereto as Appendix A.

(f) Post at its Missoula Montana facilities copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 19 of the National Labor Relations Board (Seattle, Washington), after being duly signed by Respondent's representative, shall be posted for 60 consecutive days thereafter in conspicuous place, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(g) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment what step the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ Cathy A. Catterson
Cathy A. Catterson
Clerk

Appendix B

APPENDIX A

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent failed and refused to bargain with the Union as the exclusive bargaining representative of its employees, by unilaterally laying off employees, without affording the Union a reasonable opportunity to bargain about the layoffs, Respondent shall be ordered to make the 14 employees whole for any loss[11] of earnings they may have suffered by reason o the layoffs in accord with the Board's decision in F. W. Woolworth Co., 90 NLRB 289 (1980) with interest computed in the manner set forth in New Horizons for the Retarded, Inc., 283 NLRB No. 181 (May 28, 1987).

---

[11]Reinstatement has not been ordered because the affected employees had all been recalled prior to the strike of July 27, 1987.

See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Respondent shall also be ordered to make Richard Chapdelaine and Joseph Bauer whole for any loss they may have suffered as a result of discrimination against them, with interest.

APPENDIX B

NOTICES TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse and fail to bargain collectively in good faith with International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, Local Union No. 2 as the exclusive collective bargaining representative of our unit employees, by laying off bargaining unit employees without first affording the Union a reasonable opportunity to bargain about such layoffs.

WE WILL NOT discriminate against employees in regard to layoff or recall from layoff in order to discourage membership and activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten employees with closing or selling the business, loss of benefits, miserable working conditions, layoff or loss of employment or any other form of retaliation for engaging in union activities or engaging in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don

Martin, Patty Martin, Kelly Quinn, Steve Rodriguez, Gary Trimp and Tom Yelton, for any loss of pay they may have suffered, with interest, as a result of their unlawful layoff.

WE WILL make whole Joseph Bauer and Richard Chapdelaine for our discriminatory delay in recalling them from layoff in June 1987.

WE WILL expunge from our files any reference to the March 6, 1987 layoff of our 14 employees and notify each of them that this been done and that evidence of such unlawfu. layoff will not be used as a basis for future personnel actions.

WE WILL expunge from our files any reference to the delay in recalling Bauer and Chapdelaine from layoff, and notify each of them in writing that this has been done and that evidence of this unlawful delay will not be used as a basis for future personnel actions against him.

The appropriate bargaining unit is:

All production and maintenance employees employed at our Missoula, Montana facility; but excluding office clerical

employees, guards and supervisors as defined by the Act.

USA McDONALD CORPORATION d/b/a/ NORCO PRODUCTS
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of Posting and must not he altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Second Avenue, Room 2948, Seattle, WA 98174; telephone: (206) 442-7472.

Appendix C - January 12, 1988, Decision of Administrative Law Judge, NLRB

JD(SF)--3-88
Missoula, MT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

and Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 2

Patrick F. Dunham, Esq., and
Scott F. Burson, Esq.,
of Seattle, WA, for the General Counsel.

Tommy B. Duke, Esq., of Denver, CO, for Respondent.

Timothy J. McKittrick, Esq.,
of Great Falls, MT,
for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge:

I heard these consolidated cases in trial at Missoula, Montana on September 29 through

October 2, 1987. The cases arose as follows: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 2 (the Union) filed a charge in Case 19--CA--18986 against USA McDonald Corporation d/b/a Norco Products (Respondent) on March 1[illegible] Following investigation thereof, the Regional Director for Region 19 of the National Labor Relations Board issued a Complaint and Notice of Hearing against Respondent. On June 12, the Union filed a charge against Respondent in Case 19--CA--19184. Thereafter, on July 23, 1987, the Acting Regional Director issued a Consolidated Amended Complaint in both cases. The charge in Case 19--CA--19184 was amended on July 23 and the consolidated complaint was amended on August 20, 1987 and again at trial.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Based upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is a contract manufacturer of school and institutional furniture with a facility located in Missoula, Montana. During the 12 months prior to issuance of the amended complaint, Respondent sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of Montana. I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Background and Issues

As mentioned earlier, Respondent manufactures school and institutional

furniture in Missoula, Montana. In 1986, Respondent received financing to construct a new facility in the Missoula area and construction commenced. The initial tearing down of equipment at Respondent's existing facility preparatory to the move to the new facility began in September 1986.In December 1986, some employees began moving to the new facility. However, the move of equipment and employees to the new facility was not completed Until the end of January 1987. Thus in December 1986 and January 1987, Respondent was in a transition period and utilizing two facilities.

The Union commenced a campaign to organize Respondent's employees in January 1987. On January 14 or 15, James McDonald, Respondent's president, received notice of the Union's organizing attempt. On January 15, the Union also filed a representation petition in Case 19--RC--11519. On February 25, the Regional Director conducted a secret ballot election at which the majority of the ballots were cast in favor of representation by the Union. On

March 5, the Regional Director issued a certification of representative indicating that the Union had been selected the exclusive bargaining representative of Respondent's production and maintenance employees.[1]

The instant case arises out of Respondent's campaign and reaction to the union's successful organizing campaign. The complaint alleges that during the representational campaign, Respondent threatened employees with reprisals if the Union were selected as the exclusive bargaining representative. Further, General Counsel contends that Respondent discriminatorily laid off employees after the Union won the representation election and failed to recall Richard Chapdelaine, Joseph Bauer and Jerald Nordhus, three union adherents, from layoff. Finally, the complaint alleges that Respondent failed to

---

[1]All production and maintenance employees employed at Respondent's Missoula, Montana facility, but excluding office clerical employees, guards and supervisors as defined by the Act.

bargain in good faith with the Union regarding the layoffs and certain unilateral changes contained in a newly issued employee handbook, relating to wages, hours and working conditions.

B. The Layoffs in December 1986 and January 1987

Richard Chapdelaine, an employee of Respondent, met with the Union in early January 1987. The Union set up a meeting with employees and on January 14, 1987, the Union sent Respondent a letter telling of its organizing plans and naming its in-plant organizing committee. The employees listed as being on the committee were all the production and maintenance employees with the exception of three or four employees. Respondent received the Union's letter on January 17. On January 19, approximately 12 employees were laid off, effective January 16, including Chapdelaine, Joseph Bauer and Jerald Nordhus. Although the timing of the layoff is suspicious, the General Counsel concedes that

the January 1987 layoffs were lawful.[2] Respondent's business was seasonal, there had been layoffs in December and with the move to the new facility substantially completed, more layoffs were necessary.

General Counsel contends that Chapdelaine, Bauer and Nordhus were not recalled until after the unfair labor practice charges were filed because of their union activities. Chapdelaine had initiated the Union organizing drive and had handbilled for the Union after his layoff. Bauer had been active in a 1985 campaign involving another union and also handbilled with Chapdelaine after his layoff. By the time Respondent began recalling employees from layoff in May 1987, the union activities and sympathies of Chapdelaine and Bauer were known to Respondent. Nordhus had also been active in the 1985 campaign and

---

[2]The timing of the January 19 layoff led Respondent's own supervisors to speculate that McDonald was motivated by antiunion considerations with regard to this layoff.

attended two bargaining sessions between Respondent and the Union after his layoff.

C. The Section 8(a)(1) Allegations

Upon notification of the Union's organizing campaign, James McDonald, Respondent's president, began a campaign of his own. Respondent's campaign consisted of letters to employees, plant meetings, staff meetings, an open house and "one on one" meetings between the staff and employees. The General Counsel does not contend that any unlawful statements were made to employees in the campaign letters, plant meetings, open house or "one on one" meetings. However, General Counsel contends that Respondent committed independent violations of Section 8(a)(1) by statements made by McDonald at the staff meetings which were attended by office clerical employees in addition to managers and supervisors.

Lynette Miller, a former data entry clerk, testified that prior to the February 25 election, McDonald held almost daily meetings

with his staff. The office staff that attended these meetings included Miller and Teresa Alves, office clerical employees, Mary Sneddon, sales manager, Steve Slagle, supervisor, Chuck Knudson, general manager, Roy Jensen, supervisor, and Allen Ball, controller. According to Miller, during these campaign strategy meetings, McDonald stated that the Union would not work at Respondent's business, that the Union was no good and that the Union was out for itself, not for the employees. McDonald stated on one or two occasions that if the Union was voted in, he would "lock the doors," he would quit this business and start over in something new. On another occasion, McDonald stated that if the Union was voted in, the employees would lose all benefits and vacation pay, and would have to start out as brand new employees. On another occasion, McDonald stated that if the union was voted in, he would lay off employees and run the plant with supervisors, management and only a few employees.

Prior to the election, McDonald stated that if the Union won, he would make the employees' lives miserable by turning off the heat in the wintertime, turning off the fans in the summertime and locking the bathrooms. The staff was told that if anyone was for the Union, he or she was not part of the team and might as well get up and walk out the door.

During one of the campaign meetings, McDonald called off the names of the employees and discussed whether he believed that person was a voter for the Union, an undecided voter, or a voter against the Union. McDonald gave no reason other than his personal opinion for designating any employee's sympathy as for or against the Union. McDonald asked the supervisors and managers to work on the uncommitted voters to obtain votes against the Union.

In a staff meeting shortly after the election, McDonald said he would run the plant with managers, supervisors and nine employees (five full-time and four part-time). McDonald said he would retain the five employees that

had voted for Union representation. McDonald said if the Union got in, it would hold a wildcat strike. To counter such a strike, McDonald said he would limit sales to preferred customers and would not go after new sales.

In a meeting shortly after the election, McDonald said he was resigning as president of Respondent and becoming general manager. McDonald said as general manager he would evaluate the employees on a daily basis. The employees would be evaluated on three factors: (1) attitude; (2) performance; and (3) leadership. Based on this evaluation, McDonald would determine whether an employee was for or against Respondent.

After the election, McDonald, Allen Ball and Mary Sneddon all told Miller that they were expecting certified mail indicating that the Union was the certified bargaining representative. Miller and Teresa Alves were told not to pick up certified mail until after the March layoff, so that the Union could not

claim the layoff was connected to the election results.

Teresa Alves, a former receptionist, also testified that she attended staff meetings concerning the union almost every day in the week prior to the election. According to Alves, McDonald said the Union would not work at Respondent's facility. McDonald further stated that he would negotiate with the Union but would not sign a contract with the Union. If the Union was voted in, McDonald said he would "shut the place down." On another occasion McDonald said he would reduce sales in order to lay off employees. Alves further corroborated Miller's testimony that McDonald threatened to make the employees' lives miserable by shutting off the heat in the winter, shutting off the fans in the summer and by locking the bathrooms.

A day or two after the election, McDonald told the staff that he wasn't going to sign a contract and he would reduce sales. McDonald said he would "prioritize" the customer base, decide who were the most valuable customers,

and reduce production to meet the needs of these customers. He would attempt to restrict production to products which were easier to produce, thereby reducing staffing requirements. McDonald said he would reduce the plant personnel and put some of the staff to work in the plant. McDonald said he would be functioning as general manager, but not resigning as president, and would spend most of his time in the plant rather than working in the office. McDonald stated that if any of the office staff supported the Union, that person would be terminated because he or she wouldn't be part of the team anymore.

Alves also corroborated Miller's testimony that she was instructed by McDonald, shortly after the election, not to sign for any certified mail. The certification of election results was not received by Respondent until March 9. While Miller did not repeat McDonald's remarks to any bargaining unit employees, Alves told at least one employee, Patty Martin, of the threats made by McDonald.

McDonald's denials of the testimony of Alves and Miller are not credited. McDonald first denied making the statements to employees, later denied recalling the statements and finally after leading questions, denied making the statements. Chuck Knudson, Respondent's general manager and a stockholder, did not corroborate McDonald's testimony. Although given several opportunities to deny that McDonald made the statements attributed to him by Alves and Miller, Knudson simply stated that he could not recall what McDonald had said. Randy Richards, a former plant superintendent and production coordinator, testified that McDonald ran the supervisory meetings and made a statement to the effect that he would never sign a union contract.[3] Nordhus, a former leadman, testified that McDonald made a threat at a supervisory meeting but did not recall

---

[3]In January 1987, Richards and two supervisors were overheard, by employee Scott Green, speculating that Respondent's January layoffs were "probably because of the Union."

when the meeting was held. The supervisory meetings attended by Nordhus and Richards apparently were separate meetings from the staff meetings attended by Miller and Alves. However, Miller was able to hear McDonald speaking at the supervisory meetings because McDonald often raised his voice in such meetings and could easily be heard in the offices just outside his office.

In any event, the credible testimony of Miller and Alves was not disputed by any witness except McDonald, a witness I found to be less than truthful.

As earlier indicated, after the Union won the election, McDonald informed his staff that he would become general manager and evaluate employees on a daily basis. Based on attitude, performance and leadership, McDonald would determine whether an employee was "for or against the company." These statements take on an added significance because the managers had to evaluate the staff for the upcoming layoffs. After the election, the managers were told that they would have to

reduce the staff to five full-time employees and four part-time employees. McDonald said he would retain the five employees that had voted for the Union. The managers worked together and came up with the names of the nine employees (five full-time and four part-time) that would be retained. McDonald did not change the list given to him by the managers. Rather, he laid off the remaining employees and kept those recommended by the managers. The employees were informed by McDonald on March 6 that they were laid off.[4]

D. The Layoffs of March 6

At approximately 3:30 p.m.,[5] on March 6, McDonald called the offices of the Union and asked to speak with Al Longoria, business

---

[4]The fact that McDonald individually informed each employee of his layoff was a departure from past practice.

[5]I find, based on the credible testimony of Maxine Wagner, a secretary for the Union, and Al Longoria, business agent, that McDonald did not call the Union until 3:30 p.m. on March 6. McDonald's testimony that he called earlier that date is not credited.

agent. Longoria was out of town. McDonald left a message with Maxine Wagner that he was laying off employees and that he wanted the Union to know.

McDonald testified that the March 6 layoff was planned in December 1986. According to McDonald, based on the list of orders, sales backlog, inventory and shipping requirements, it was clear in December that layoffs were necessary in January and more drastically in February 1987. According to McDonald, he did not implement [illegible] before March because he was requested by a Board Field Examiner to delay the layoffs until after the February 25 election.[6]

---

[6]I do not credit McDonald's testimony that he delayed the layoffs until after the election because of the Board Agent's request. The Board Agent did not testify, leading to the inference that his testimony would have been unfavorable to the General Counsel's case. However, the inference would only lead to the conclusion that the Board Agent asked McDonald to delay the layoffs, the question of McDonald's reason for doing so is not within the knowledge of the Board Agent. I do not believe that McDonald would so increase his payroll costs simply upon the request of a government examiner. Moreover, no manager or supervisor for Respondent

Appendix C

Layoffs by Respondent are commonplace during the winter and spring months. Due to the move to the new plant, Respondent was able to avoid lying off employees in December and January. Jobs for employees were created by utilizing production employees for moving, construction and maintenance work related to the tearing down of the old plant and installation and construction at the new facility. The installation, construction and maintenance work lessened in January and February.

---

corroborated this testimony. Rather the testimony reveals that a week after the election the supervisors and managers were instructed to work on the staffing to be retained after a layoff There was no testimony, other than McDonald's self-serving testimony, that layoffs were necessitated as planned prior to the election. Moreover, as will be seen below, the ividence establishes that the instant layoffs were more drastic that in the past and more drastic that norman business practices would establish. Moreover, prior to the instant hearing, McDonald gave a statement to the Board Agent which indicated that he did not lay off employees before the election because he expected them to vote overwhelmingly against the Union and that he wanted the employees to have the opportunity to do so.

Richards, a former Plant superintendent and production coordinator, and Miller, a former data entry clerk, both testified that the layoffs in March 1987 were more drastic than in the past and required more overtime work by the managers and supervisors. Respondent's records reveal the accuracy of Richards' and Miller's observations. In order to continue production with the bare bones staff left after the March layoffs, Respondent had to utilize managers and supervisors to keep up with production. overtime hours increased in April. Finally, in May, Respondent began recalling Employees from layoff.

Further, the records reveal that in 1986, Respondent retained more than twice as many Production employees after its spring layoffs. Thus in 1986, Respondent retained the equivalent of full-time employees. In 1987, Respondent retained the equivalent of eight full-time employees. Respondent retained only five full-time and four part-time employees in 1987 in spite of the fact that its sales backlog was higher than the sales backlog in

1986, which justified retention of 20 full-time equivalent employees.

E. The Recall of Employees

In May, Respondent began recalling employees from layoff. Nordhus was offered a job in may, prior to the recall of any employee laid off prior to him. However, Nordhus was offered construction work rather than production work and turned down the job offered. Nordhus had been doing non-production work, related to the move, prior to his layoff. Bauer and Chapdelaine were not offered reemployment until July 15 and 17 respectively. Respondent recalled employees laid off prior to Bauer and Chapdelaine beginning as early as June 8. In all, five employees were unexplainedly recalled prior to the recall of Bauer and Chapdelaine. Although the "attitude, performance and leadership" of these five employees were inferior to Bauer and Chapdelaine in December 1986 and January 1987, they were recalled prior to Bauer and

Chapdelaine in June and July 1987. McDonald gave no credible explanation for this recall procedure. It appears that Respondent's normal practice would have been to offer work to employees laid off in January before offering such work to employees laid off in December.

F. The Handbook

The Respondent has distributed an employee handbook since 1979. A revised handbook was distributed to employees after the Union was certified as the exclusive bargaining representative. The changes in the handbook distributed after the election included a "no smoking provision which was instituted because of the new facility. This was previously announced to the employees in September or October of 1986. The amount of vacation to be received based on years of service was modified in 1986 and became effective on January 1, 1987 only as to employees hired after that date. The third modification related to a statement concerning the

seasonality of the business. The change in language did not reflect any change in the established past practice. McDonald testified without contradiction that the policies and practices contained in the revised manual were all in effect prior to January 1987.

McDonald's testifying that the handbook was completed prior to the Union's certification is riot credited. Alves credibly testified that she was asked by Allen Ball to type the new employee handbook. The changes in the handbook were not completed when Alves left Respondent's employ on March 7. Finally, it is undisputed that the Union received no notice of the new employee handbook.

G. The Refusal to Bargain over Layoffs

After McDonald notified the Union on March 6 of the layoffs, he did not hear from the union on March 6, 7 or 8. On March 9, McDonald prepared letters concerning the layoffs to the 14 laid off employees and sent copies to the Union. The Union and Respondent began bargaining on March 16 at which time the Union contended that the layoffs were illegal

and demanded that the employees be reinstat- Respondent said the layoffs were not connected with the Union and gave the Union economic reasons for the layoffs. The Union made no demand to bargain over the effects of the layoffs. On July 27, 1987, the Union commenced a strike against Respondent. That strike was still in progress at the time of the instant hearing.

All of the 14 employees laid off on march 6 were recalled in June, prior to the strike of July 27, 1987. The names of the 14 employees are: Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don Martin, Patty Martin, Kelly Quinn, Steve Rodriquez, Gary Trimp and Tom Yelton.

Analysis and Conclusions

1. The Statements to Employees

Based on the credited testimony of Miller and Alves, I find that McDonald unlawfully threatened to terminate employees if they supported the Union and told then they should quit if they supported the Union. San Souci Restaurant. 235 NLRB 604 (1978); Bell Burglar Alarms, Inc., 245 NLR . Further, McDonald unlawfully threatened that employees would have to begin from scratch as if they were new employees. Centre Engineering, Inc., 246 NLRB 632 (1979) . McDonald threatened to lay off all bargaining unit employees except those that voted for the Company against the Union, in violation of Section 8(a)(1). Tendico, Inc., 232 NLRB 735 (1977); Strong Steel, 233 NLRB 1348 (1977). Moreover, McDonald threatened less favorable conditions and harder working conditions if the employees voted for Union representation. Continental Can Co., 282 NLRB No. 174 (1987); Mercury Marine, 282 NLRB No. 119 (1987).

Appendix C

Respondent argues correctly that the General Counsel had not alleged nor established any violations at meetings held for employees. Respondent cautioned its supervisors not to violate the Act in the pre-election campaign. However, the issue herein is whether statements made by McDo at staff .strategy" meetings are violations due to the pres tutory employees such as Alves and Miller. As indicated earlier I reject McDonald's assertion that the statements were not made and find that threats in violation of Section 8(a)(1) were uttered both before and after the election.

Although McDonald apparently believed the threats were privileged because no bargaining unit employees were present, ignorance of the law is no excuse. Miller and Alves were clerical employees and there is no dispute that they were employees within the meaning of Section 2(3) of the Act. See e.g., Consolidation Coal Company, 266 NLRB 560 (1983); Giant Food Markets, Inc., 241

NLRB 727 (1979); and Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). See also Musicians Union Local 47, 255 NLRB 386, 390 (1981). The Board has found protect employees even though the employer's action was motivated by animosity against the protected activity of other Employees. See Lucky Stores, Inc., 243 NLRB 642, 647 (1979). Further, the Board has held that an employer violates the Act if it retaliates against an employee based on the union activities of a relative. See e.g, Ram, Inc., 218 NLRB 430, 433 (1975).

Hearing the threats and statements of McDonald certainly conveyed to Miller and Alves that the Respondent would take unlawful actions to prevent the unionization of the production and maintenance employees. The inference would easily be drawn that Respondent would similarly take unlawful action to prevent the unionization of its clerical employees. Thus, McDonald's conduct would reasonably tend to inhibit Miller's and Alves' future union activities. In addition, threats such as those made by McDonald are

likely to be repeated to bargaining unit employees. In the instant case, Alves told unit employee Patty Martin of a threat made by McDonald. Miller did not repeat the threats of McDonald to any unit employees because she did not wish to threaten anybody by publishing McDonald's threats.

2. The Layoffs in March of 1987

In Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enfd. 662 F.2d (1st Cir. 1981), cert. denied, 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme

Court approved and adopted the Board's Wright Line test in NLRB v. Transportation Corp., 462 U.S. 393, 399-403 (1983).

For the following reasons, I find that the General Counsel has made a prima facie showing that Respondent was motivated by a desire to retaliate against its employees for voting for Union representation. First, the evidence establishes that McDonald made threats to retaliate against employees both before and after the election. Shortly after the Union won, the election, McDonald said he would lay off Employees and run the plant with the supervisors, managers and only five full-time employees. He said he would retain the employees that voted for the Company and against the Union. In speaking of the layoffs, McDonald said he would evaluate employees on attitude, performance and leadership. Based on McDonald's comments about unions, the supervisors could only conclude that Union supporters lacked the proper attitude, enthusiasm and leadership

required for retention in the face of such a drastic layoff.

Although Respondent usually had layoffs each spring, the testimony indicates that this layoff was retaliatory and that a smaller number of employees than usual were retained. Respondent's own records support this contention.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. McDonald in his testimony attempted to portray the layoffs as automatic and dictated by the seasonality of sales orders. However, the layoffs are highly discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work. McDonald apparently disregarded his usual procedure of consulting with managers and determined the timing of the layoff and the number of employees (five full-time and four part-time) himself. McDonald never explained why more employees were retained in 1986 when the sales backlog

was less than in 1987. The managers and supervisors were left with the decision of which employees to retain. Even in this regard, McDonald, dictated that employees should be retained based on attitude, performance and leadership. The supervisors and managers, having been told that employees who were against the Union were team players and union supporters were not on the team, may have very well determined that pro-Union employees did not have the desired attitude and leadership qualities. However, there is no evidence that the managers did, in fact, utilize union considerations in making this decision.[7] McDonald, having decided to cut the work force to such a bare minimum, may have caused the managers to disregard any consideration other than work performance. Having cut the bargaining unit complement so low, McDonald forced his supervisors and

---

[7]General Counsel concedes that in retaining employees McDonald did not know who voted for the Union. General Counsel only contends that McDonald threatened to retain those five employees who voted for the Union.

managers to engage in bargaining unit work and to work overtime in order to keep up with production.

As mentioned earlier, Respondent has in the past had seasonal layoffs in the spring. Respondent does have business justification for a layoff and there is nothing to suggest that Respondent would not ordinarily have had a spring layoff. However, Respondent has not adequately explained the extent of its layoffs. The evidence establishes that this layoff deviated from past practice to the extent that Respondent's managers and staff were required to do more production work because a smaller number of production employees than usual were retained. After a few weeks of such acute pressure on the supervisors, managers and staff, Respondent commenced recalling employees. In previous years Respondent retained more employees after its spring layoffs. For example, in 1986 Respondent retained more than twice as many employees even though its sales backlog was lower than in 1987. Although I cannot find

with precision the number of employees that would have normally been retained, I conclude that Respondent included a greater number of employees in this layoff than it normally would have laid off in retaliation for its Employees' voting for union representation. The difficult question of determining the identity of the employees to whom a remedy is owed would normally be left to the compliance stage. See eg., Madison South Convalescent Center, 260 NLRB 816 (1982) and Alexander's Restaurant and Lounge, 228 NLRB 165 (1977). However, in view of my findings below that Respondent's layoff of March 6 violated Section 8(a)(5) and (1) of the Act, the remedy for the 8(a)(3) violation is incorporated in the 8(a)(5) remedy. All employees laid off on March 6, 1987 will be made whole as a result of Respondent's failure to give the Union an opportunity to bargain concerning the layoffs.

3. The Failure to Recall Chapdelaine, Bauer and Nordhus

I find that the General Counsel has made a prima facie showing that Respondent was

motivated by its desire to retaliate against its employees for choosing union representation in not recalling Chapdelaine and Bauer prior to its recall of employees previously laid off. By June 1987, Respondent was aware of union activity on the part of Chapdelaine and Bauer. As set forth in detail above, Respondent had great animus against the employees choice of the Union. under Respondent's layoff and recall procedures, Chapdelaine and Bauer would normally have been recalled before employees who had been laid off in December. As Respondent has not offered any reason for the recalling of employees laid off in December, prior to recalling Chapdelaine and Bauer, I find Respondent has not rebutted the General Counsel's prima facie case. Accordingly, under Wright Line, a violation of Section 8(a)(3) of the Act has been established.

I find that the General Counsel has not established a prima facie case concerning Nordhus. Nordhus was offered reemployment prior to the recall of any employee who had

been laid off before him. There is no showing that Nordhus was not offered reemployment at the first opportunity. There was no allegation that his layoff was unlawful. The offer of reemployment was not to a production job but there is no evidence that Respondent had any unlawful motive in such an offer. Respondent had created job opportunities for its employees by giving them moving, construction and maintenance work prior to the layoffs. In fact, Nordhus was involved in such nonproduction work in the weeks prior to his January layoff. Thus, the evidence does not establish that Nordhus was treated any differently with respect to recall than he would have been treated in the absence of the employees' selection of the Union.[8]

---

[8]Respondent contends that Nordhus was a supervisor within the meaning of Section 2(11) of the Act. In view of my finding regarding his recall, I need not reach the question of whether Nordhus, a leadman, was a statutory supervisor.

4. The Failure to Bargain Prior to the Layoffs

The law is well settled that an employer, whether unlawfully motivated or not, violates Section 8(a)(5) and (1) of the Act when it institutes a material change in the terms and conditions of employment in an area that is a mandatory subject of collective bargaining without giving the bargaining agent both reasonable notice and an opportunity to negotiate about the change. Local 512, Warehouse & Office Workers v. NLRB, 795 F.2d 705 (9th Cir. 1986); NLRB v. Katz, 369 U.S. 736, 747 (1962). Where an employer plans to lay off employees represented by a bargaining agent, it is the employer's "responsibility to notify the Union and to offer to bargain prior to implementing the layoff." Peat Mfg. Co., 261 NLRB 240, n. 2 (1982). Once the decision is made "the employer must notify the Union and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected.

Clements Wire & Manufacturing Co., 257 NLRB L058 (1981). The fact that the Union had not been certified at the time of the March 6 layoffs is not material inasmuch as it had prevailed in the representation election conducted 9 days earlier. An employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes between an election and certification of a union. Local 512, Warehouse & Office Workers, supra; Bay Diner, 250 NLRB 187, n. 2 (1980).

Respondent argues that it gave the Union notice of the layoffs and that the Union did not attempt to bargain over that issue. I find no merit to that defense. McDonald did not notify the Union until the late afternoon of the very day the layoffs took place. There was no justification for such short notice, particularly where McDonald claimed that the layoffs were planned for months. In any event, the notice given the union here was insufficient to provide the Union with an adequate opportunity to bargain. Cliffside Health Care Center, 279 NLRB No. 166 (1986);

Constructive Sheet Metal, 283 NLRB No. 159, Slip op. n. 2 (1987).

There is no merit in Respondent's defense that the Union's inaction privileges Respondent's conduct or amounts to a waiver. First, as noted above, the union was not prior notice of the layoffs. Thus, McDo actions presented the Union with a fait accompli and precluded any meaningful bargaining. Second, Respondent's antiunion statements and discriminatory increase in the size of the layoff reveal an attempt to vitiate the role of the Union as bargaining agent. M. A. Harrison Mfg., 253 NLRB 675 (1980), enfd. 682 F.2d 580 (6th Cir. 1982). Third, 3 days after the layoff, the Union claimed that the layoffs were discriminatory and demanded reinstatement for the employees, thereby indicating its desire to bargain over the layoffs. Thereafter, the Union filed a timely unfair labor practice charge. Under such circumstances, the defense of waiver is not available to Respondent and a waiver of

bargaining rights by the Union cannot be found.[9]

5. The New Employee Handbook

The General Counsel established that Respondent issued a new employee handbook after the Union's certification, without prior notice to and bargaining with the Union. While there were changes in the new handbook from the old handbook re[illegible] smoking," vacation and seasonality of the business, there is no evidence that such language changes were changes in established working conditions. Rather, the only evidence on this point is McDonald's unrebutted testimony[10] that the conditions were announced in 1986

---

[9]It is well settled that a waiver of bargaining rights must be "clear and unmistakable." See, e.g., New York Mirror, 151 NLRB 834 (1965); Air Vac Industries, 282 NLRB No. 991 (1987).

[10]While McDonald was not a credible witness, General Counsel did not adduce any testimony to establish that the conditions listed in the handbook had not been announced in 1986 and placed in effect in January 1987.

prior to the Union's campaign and had been in effect since January 1, 1987. In, these circumstances, I cannot find that a change has been proven by the preponderance of the credible evidence. See Holiday Inn of Victorville, 284 NLRB No. 101 (1987).

The Board has held that in order for a unilateral change in a term or condition of employment to constitute a violation of Section 8(a)(5), it must be a material, substantial and significant change. Alamo Cement Co., 277 NLRB 1031 (1985); Weather Tec Corp., 238 NLRB 1535, 1536 (1978). Under the circumstances of this case, the issuance of a revised handbook, not shown to contain changes from existing policies, does not constitute a material, substantial, and significant change in a term or condition of Employment and, therefore, is not a violation of Section 8(a)(5) of the Act.

Appendix C

Conclusions of Law

1. Respondent, USA McDonald Corporation d/b/a Norco Products, is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 2, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8 (a) (5) and (1) of the Act by laying off Employees on March 6, 1987 without adequate notice to the Union and without affording the Union a sufficient opportunity to bargain about these layoffs.

4. Respondent has engaged in unfair labor practices in violation of section 8(a) (3) and (1) of the Act by increasing the number of employees laid off in its layoff of march 6, 1987, because its employees selected the Union as their collective bargaining representative.

5. Respondent has engaged in unfair labor practices in violation of Section 8(a) (3) and (1) of the Act by delaying the recall from layoff of employees Richard Chapdelaine and Joseph Bauer, because of the union activities of its Employees.

6. Respondent has engaged in unfair labor practices in violation of section 8 (a) (1) of the Act by telling employees that it would close or quit its business if the Union was voted in as bargaining representative, that employees would lose all benefits and have to start over as new Employees if the Union was voted in as bargaining-representative, that Respondent would lay off employees and run the plant with supervisors, management and only a few Employees if the Union was voted in, that Respondent would lay off employees and only retain those that voted against the Union, that Respondent would turn off the heat, turn off the fan and otherwise make working conditions miserable if employees selected the Union, and that any employee who favored the Union should leave the Respondent's Employ.

7. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at Respondent's Missoula, Montana facility; but excluding office clerical employees, guards and supervisors as defined by the Act.

8. Except as specifically found above, Respondent did not violate the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Having found that Respondent failed and refused to bargain with the union as the exclusive bargaining representative of its employees by unilaterally laying off employees, without affording the Union a reasonable opportunity to bargain about the layoffs, Respondent shall be ordered to make the 14 employees whole for any loss of earnings[11] they may have suffered by reason of the layoffs in accord with the Board's decision in F.W. Woolworth Co., 90 NLRB 289 (1980) with interest computed in the manner set forth in New Horizons for the Retarded, Inc., 283 NLRB No. 181 (May 28, 1987). See

[11]Reinstatement has not been ordered because the affected employees had all been recalled prior to the strike of July 27, 1987.

generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Respondent shall also be ordered to make Richard Chapdelaine and Joseph Bauer whole for any loss they may have suffered as a result of the discrimination against them, with interest.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

Respondent, USA McDonald Corporation d/b/a Norco Products, its officers, agents, successors, and assigns, shall:

---

[12]All outstanding motions inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix C

1. Cease and desist from:

a. Refusing and failing to bargain collectively in good faith with the Union as the exclusive collective bargaining representative of Respondent's unit employees, by laying off unit employees without first affording the Union a reasonable opportunity to bargain about such layoffs.

b. Discriminating against employees in regard to layoff or recall from layoff in order to discourage membership and activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 2, or any other labor organization.

c. Threatening employees with closing or selling the business, loss of benefits, miserable working conditions, layoff or loss of employment or any other form of retaliation for engaging in union activities or for engaging in activity protected by Section 7 of the Act.

d. In any like or related manner interfering with, restraining, or coercing

employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of-the Act:

a. Make whole all 14 bargaining unit employees laid off on March 6, 1987 for any loss of pay they may have suffered as a result of the unlawful layoff, in the manner set forth above, in the section entitled "The Remedy."

b. Make whole Joseph Bauer ana Richard Chapdelaine for the discriminatory delay in recalling them from layoff in July 1987, in the manner set forth above, in the section entitled "The Remedy."

c. Expunge from its files any reference to the layoffs of the employees described in subparagraph (a) above, and notify each of them that this has been done and that evidence of such unlawful layoff will not be used as a basis for future personnel actions.

d. Expunge from its files any reference to the delay in recalling Bauer and Chapdelaine from layoff, and notify each of them in writing that this has been done and that evidence of this unlawful delay will riot be used as a basis for future personnel actions against him.

e. Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay rights set forth in the section entitled "The Remedy."

f. Post at its Missoula, Montana facilities copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted for 60 consecutive days thereafter in

---

[13]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

g. Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

Dated: January 12, 1988

JAY R. POLLACK
Administrative Law Judge

Appendix C

JD(SF)--3--88

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse and fail to bargain collectively in good faith with International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 2 as the exclusive collective bargaining representative of our unit employees, by laying off bargaining unit employees without first affording the Union a reasonable opportunity to bargain about such layoffs.

WE WILL NOT discriminate against employees in regard to layoff or recall from layoff in order to discourage membership and activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten employees with closing or selling the business, loss of benefits, miserable working conditions, layoff or loss of employment or any other form of retaliation for engaging in union activities or for engaging in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Appendix C

WE WILL make whole Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don Martin, Patty Martin, Kelly Quinn, Steve Rodriguez, Gary Trimp and Tom Yelton, for any loss of pay they may have suffered, with interest, as a result of their unlawful layoff.

WE WILL make whole Joseph Bauer and Richard Chapdelaine for our discriminatory delay in recalling them from layoff in June 1987.

WE WILL expunge from our files any reference to the March 6, 1987 layoff of our 14 employees, and notify each of them that this has been done and that evidence of such unlawful layoff will not be used as a basis for future personnel actions.

WE WILL expunge from our files any reference to the delay in recalling Bauer and Chapdelaine from layoff, and notify each of them in writing that this has been done and that evidence of this unlawful delay will not be used as a basis for future personnel actions against him.

Appendix C

The appropriate bargaining unit is:

All production and maintenance employees employed at our Missoula, Montana facility; but excluding office clerical employees, guards and supervisors as defined by the Act.

USA MCDONALD CORPORATION d/b/a NORCO PRODUCTS
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the. Board's office, 915 Second Avenue, Room 2948, Seattle, WA 98174; telephone: (206) 442-7472.

Appendix D.
Board's order of May 31, 1988
(288 NLRB No. 151), (288 NLRB 1416),
Board Case Nos. 19-CA-18986 and 19-CA-19184

288 NLRB No. 151 JBC

D--6089
Missoula, MT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

USA MCDONALD CORPORATION
d/b/a NORCO PRODUCTS

and Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA
LOCAL UNION NO. 2, AFL--CIO[1]

DECISION AND ORDER

On January 12, 1988, Administrative Law Judge Jay R. Pollack Issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

---

[1]The name of the Charging Party has been amended to reflect the fact that effective November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3],

---

[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At various points in his decision, the judge referred to the Respondent's president, James McDonald, as having stated that he would retain the employees who had voted for the Union. This was an inadvertent error as the record shows that McDonald stated he would retain the employees who voted against the Union.

[3]Member Cracraft does not adopt the judge's reliance on Peat Mfg. Co., 261 NLRB 240 fn. 2 (1982), for the proposition that an employer must notify the union and "offer to bargain" before implementing a material change in a mandatory subject of bargaining. She finds the quoted language of Peat Mfg., to be inconsistent with other Board cases holding that an employer is not obligated to make an affirmative offer to bargain.

In Medicenter, Mid-South Hospital, 221 NLRB 670, 678-679 (1975), for example, the Board adopted the judge's decision finding applicable to cases involving employer unilateral changes the language used by the Supreme Court in the early case of NLRB v. Columbian Enameling, Stamping Co., 306 U.S. 292, 297-298 (1939), that "the statute does not compel [the employer] to seek out his employees or request their participation in negotiations for purpose of collective bargaining . . . . To put the employer in default here the employees must at least have signified to respondent their desire to negotiate." In Medicenter, the governing test was stated as follows (221 NLRB at 676): "When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." In fact, in Medicenter the employer did not formally notify the union of its intent to change employment conditions and did not formally offer to bargain. Nevertheless, the unilateral change allegation of the complaint was dismissed on the ground that the union had waived its right to bargain over the proposed change. The critical facts showed that the union received actual notice of the proposed change, but merely protested the contemplated action without ever requesting bargaining, even though the employer stood ready to bargain. Medicenter was explicitly followed 2 years later in a case with very similar facts. Clarkwood Corp., 233 NLRB 1172 (1977).

Inasmuch as Medicenter and Clarkwood are based on a Supreme Court decision, Member Cracraft considers them to be more persuasive authority than Peat Mfg. relied on by the judge here. This disagreement with the judge does not affect the result in this case, however, because here the Union did not receive sufficient advance notice of the layoff to provide it with

and to adopt the recommended Order.

---

an adequate opportunity to bargain.

Members Babson and Johansen note that the language, "offer to bargain," as used in Peat Mfg., is dictum, and they find it unnecessary to pass on its viability in the instant case, as the Respondent in any event gave the Union insufficient notice of the layoff.

Appendix D

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, USA McDonald Corporation d/b/a Norco Products, Missoula, Montana, its officers, agents. successors, and assigns, shall take the action Set forth in the Order.

Dated, Washington, D.C. May 31, 1988

Wilford W. Johansen, Member

Marshall B. Babson, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix E
Board's supplemental decision granting partial summary judgment, February 23, 1990

297 NLRB No.

SCD
D--1133
Missoula, MT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

USA McDONALD CORPORATION
d/b/a NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF OF AMERICA, LOCAL UNION NO. 2, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On May 31, 1988, the National Labor Relations Board issued its Decision and Order in this case directing USA McDonald Corporation d/b/a Norco Products (the Respondent) to make whole employees Joseph Bauer, Richard Chapdelaine, Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don Martin, Patty Martin, Kelly Quinn, Steve Rodriguez, Gary Trimp, and Tom Yelton for any losses they may have incurred as a result of the Respondent's unfair labor

practices.[1] On December 1, 1988, the United States Court of Appeals for the Ninth Circuit entered its judgment enforcing the Board's Order.[2] On January 5, 1989, the Regional Director for Region 19 issued a backpay specification that set forth specifically and in detail the backpay computations for the net backpay due the above-named employees. Although the Respondent never filed a document entitled "answer" to the backpay specification, it did file substantial correspondence relating to the specification with the Regional Office.[3] On February 16,

---

[1]288 NLRB No. 151.

[2]The court's judgment was not published.

[3]During the period January 17, 1988, through February 9, 1989, the Respondent wrote nine letters to various individuals in the Regional Office. In these letters the Respondent, inter alia, stated its disagreement with the decisions of the administrative law judge, the Board, and the Ninth Circuit Court of Appeals; alleged that the case against it was the result of a conspiracy by disgruntled employees, the Union, and the Board to intentionally injure the Company; requested disciplinary action against certain Regional Office employees; requested copies of applicable rules and regulations and cases; disagreed with

1989, the Respondent also filed a motion to dismiss the specification in the Ninth Circuit Court of Appeals, in which it denies the allegations in the backpay specification

---

the Regional Office as to the applicability of certain case law; asked the Regional Office to provide the evidence for its backpay allegations; and claimed no backpay was due. The Regional Office answered the Respondent's letters repeatedly explaining in depth the finality of the unfair labor practice issues, the Board's backpay procedures, the specification itself, and the applicable law; and provided copies of the applicable sections of the Board's Rules and Regulations; and offered to provide copies of the cases at reasonable cost ($22.50). The Regional attorney wrote assuring the Respondent that everything possible had been done to ensure fairness and due process, and that the Board was not involved in any conspiracy to injure the Company, and urging the Respondent to employ experienced counsel. Counsel for the General Counsel wrote asking whether the Respondent intended its correspondence to constitute an answer, explaining that the correspondence failed to meet the Board's requirements for specificity, and stating his intention to seek summary judgment if no appropriate answer was forthcoming. The Regional Office invited the Respondent to make an offer of monetary settlement at any time. The Respondent's request that the Board provide sanctions against the Regional Office is denied as lacking in merit.

paragraph by paragraph.[4]

On February 22, 1989, the General Counsel filed with the Board a Motion for Partial Summary Judgment with respect to the computation of gross backpay, with exhibits attached.[5] The General Counsel's motion alleged that the Respondent did not file an answer to the gross backpay allegations in the specification with the specificity required by the Board. On February 27, 1989, the Board issued a Notice to Show Cause why the General Counsel's Motion for Partial Summary Judgment should not be granted. The Respondent filed a

---

[4]Copies of the motion to dismiss were forwarded to the Board by both the Respondent and the General Counsel. We note that the Respondent is not represented by counsel in this proceeding. In the circumstances of this case, we will construe the Respondent's timely filed correspondence, as clarified by its motion to the court, as a timely answer. See generally Standard Materials, 252 NLRB 679 (1980) (Board considered response to Notice to Show Cause to be an amended answer curing deficiencies in original answer).

[5]On February 27, 1989, the General Counsel filed a supplement to his motion.

timely response to the Notice to Show Cause.[6]

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Partial Summary Judgment

---

[6]The due date for a response to the Notice to Show Cause was March 13, 1989. The Board's Rules and Regulations, Sec. 102.111, provides that the Board will accept as timely filed any document that is postmarked on the day before or earlier than the due date. The Respondent filed a response postmarked March 12, 1989. Therefore, the General Counsel's motion to strike is denied.

The parties also filed the following additional documents: the Respondent filed a motion to dismiss backpay specification and objection to Motion for Partial Summary Judgment, the General Counsel filed a response to that motion and another document styled the General Counsel's response to Respondent's de facto motion to dismiss, and the Respondent filed a rebuttal to the General Counsel's response to Respondent's de facto motion to dismiss.

The Respondent's motion fails to state any proper basis for dismissing the specification. Accordingly, we deny the Respondent's motion.

Appendix E

Section 102.56(b) and (c) of the Board's Rules and Regulations, states:[7]

> (b) Contents of answer to specification.---The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of all allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) Effect of failure to answer or to plead specifically and in detail allegations of specification.---If the

---

[7]Formerly Sec. 102.54. The Board amended its rules governing proceedings concerning compliance with Agency orders effective November 13, 1988. The substance of former Secs. 102.54 and 102.55 has been incorporated into Sec. 102.56 as revised; and former Sec. 102.56, with some modification, has become the new Sec. 102.57, while the substance of former Sec. 102.57 has become par. (c) of the new Sec. 102.55, in the revised rules.

> respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The Motion for Partial Summary Judgment submits that Respondent did not file an answer to the gross backpay allegations of the specification with the specificity required by the Board. In a supplemental filing with respect to the General Counsel's Motion for Partial Summary Judgment, the General Counsel argues that the Respondent's motion to dismiss filed with the Board and the court has all the substantive inadequacies of the prior correspondence. The General Counsel submits that to the extent that the motion to dismiss is to be considered an answer to the

specification, it should be stricken as nonresponsive, untimely, and improperly filed.

As noted above, we have decided to construe Respondent's correspondence, including its motion to dismiss, as a timely filed answer. However, we find that with one exception noted below, the Respondent's answer to the gross backpay allegations does not conform to the Board's Rules and Regulations. Thus, the Respondent has offered a general denial to each of the allegations of the specification, except paragraph 6. The Respondent has generally denied the accuracy of the General Counsel's allegations concerning the backpay period, the formula used to compute backpay, and the computation of gross backpay for each employee. The General Counsel asserts that information regarding each of these matters is within the Respondent's knowledge, and that the Respondent has failed to state the basis for its disagreement with any of the allegations in the specification.

Accordingly, the General Counsel contends that the Respondent's general denials do not comply

with the requirements of the Board's Rules, and therefore the allegations of the backpay specification should be deemed to be true and that partial summary judgment should be granted as to the computation of gross backpay.

We agree with the General Counsel's contention, except with respect to that part of paragraph 6 that pertains to the wage rate of Joe Bauer. Inasmuch as the data at issue is within the Respondent's knowledge and control, its failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.56(b). As the Respondent has failed to deny the gross backpay allegations in the manner prescribed or explain its failure to do so, we deem such allegations to be admitted to be true under Section 102.56(c). Accordingly, we deem the allegations of paragraphs 1, 2, 3, 4, 5, and 6 (except concerning Joe Bauer) of the backpay specification to be admitted as true.

Further, we shall grant the General Counsel's Motion for Partial Summary Judgment as it pertains to these allegations.

Concerting the allegations of paragraph 6 of the backpay specification relating to the wage rate of Joe Bauer, the Respondent specifically denies the accuracy of the allegation and furnishes alternative figures in compliance with Section 102.56(b). Therefore, we find the Respondent's answer to this allegation is sufficient to raise a genuine issue of material fact that may best be resolved after a hearing before an administrative law judge. Accordingly, we deny the General Counsel's Motion for Partial Summary Judgment regarding Joseph Bauer's rate of pay.

D--1133

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted with respect to the gross backpay allegations of the specification, except concerting the wage rate of Joseph Bauer.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 19 for the purpose of issuing a notice of hearing and scheduling the hearing before an administrative low judge, which shall be limited to taking evidence concerning the wage rate of Joseph Bauer and the interim earnings of Joseph Bauer, Richard Chapdelaine, Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don Martin, Patty Martin, Kelly Quinn, Steve Rodriguez, Gary Trimp, and Tom Yelton.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of

law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

Dated, Washington, D.C. February 23, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix F
March 23, 1990, Board denial
Petitioner's Motion for Reconsideration

Missoula, MT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

USA McDONALD CORPORATION
d/b/a NORCO PRODUCTS

and

Cases 19-CA-18986
19-CA-19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 2, AFL-CIO

ORDER DENYING MOTION

On February 23, 1990, the National Labor Relations Board issued a Supplemental Decision and Order in the above-entitled proceeding[1] in which the Board granted counsel for the General Counsel's Motion for Partial Summary Judgment with respect to the gross backpay allegations of the specification and remanded the proceeding to the Regional Director for Region 19 for the purpose of scheduling a hearing before an administrative law judge.

Thereafter, on March 22, 1990, the Respondent filed a Motion to Reconsider Board's Supplemental Decision and Order. The

---

[1]297 NLRB No. 134.

Respondent contends that summary judgment based on Region 19's unfounded allegations deprived Respondent of the right to be heard and issuance of a judgment based on allegations which have escaped being heard or ruled on by the Court is arbitrary and capricious. Therefore, the Respondent requests the Board to reconsider and set aside the order.

The Board having duly considered the matter,

IT IS ORDERED the Respondent's Motion is denied as it raises no matters not previously considered.

Dated, Washington, D.C., March 23, 1990.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

Appendix G
Supplemental decision and order of the National Labor Relations Board issued on August 28, 1990, adopting ALJ Supplemental Decision issued on May 2, 1990

299 NLRB No. 93 (No. 2 D&O)

D--1440
Missoula, MT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

USA MCDONALD CORPORATION
d/b/a NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 2, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On May 2, 1990, Administrative Law Judge Richard J. Boyce issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,

findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of

---

[2]The judge states that the Respondent did not file a formal answer to the original backpay specification, "instead submitting various letters to Region 19." We note that the Board treated Respondent's letters as a timely answer, Norco Products, 297 NLRB No. 134 (Feb. 23,1990).

In its exceptions, the Respondent contends that by filing a Motion for Summary Judgement on the backpay specification, Region 19 did not honor its promise to the Respondent that there would be a hearing. The Board found in the earlier proceeding that the Respondent's answer was insufficiently specific to entitle the Respondent to a hearing over gross backpay allegations of the specification except as they related to Joseph Bauer under the Board's Rules and Regulations, Sees. 102.56(b) and (c). 297 NLRB No. 134, supra. However, the matter was remanded to the Region for a hearing regarding the interim earnings of the discriminatees and regarding the gross backpay for discriminatee Joseph Bauer.

The Respondent contends that Region 19 engaged in misconduct intended to "intentionally and wrongfully damage the Respondent." The Board previously considered and rejected the Respondent's claim of misconduct by Region 19, 297 NLRB No. 134 at fn. 3.

the administrative law judge and orders that the Respondent, USA McDonald Corporation d/b/a Norco Products, Missoula, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Supplemental Order.

Dated, Washington, D.C. August 28, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD(SF)--47--90
Missoula, Montana

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

AND

CASES 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 2
AFL-CIO

James C. Sand, Esq., for
the General Counsel.

Ronald Preston of USA McDonald
Corp. d/b/a Norco Products,
for the Respondent.

SUPPLEMENTAL DECISION

RICHARD J. BOYCE, Administrative Law Judge

I. Statement of the Case

By decision and order dated May 31, 1988, reported at 288 NLRB No. 151, the National Labor Relations Board ("Board") directed USA McDonald Corporation d/b/a Norco Products ("Respondent") to make some 16 employees whole for any losses they may have incurred as a result of Respondent's unfair labor practices. The

Board's order was enforced by the United States Court of Appeals, 9th Circuit, in an unreported decision dated December 1, 1988.

On January 5, 1989, the Regional Director for Region 19 issued a backpay specification alleging the amounts due under the Board's order. Respondent did not file a formal answer to the specification, instead submitting various letters to Region 19 and filing a misplaced motion to dismiss with the 9th Circuit Court of Appeals in which it denied the allegations of the specification paragraph by paragraph.

On February 22, 1989, the General Counsel filed with the Board a motion for partial summary judgment, alleging that Respondent had failed to file an answer as required by the Board's Rules and Regulations. By supplemental decision and order dated February 23, 1990, reported at 297 NLRB No. 134, the Board granted the General Counsel's motion "with respect to the gross backpay allegations of the specification, except concerning the wage rate of Joseph Bauer," and remanded the proceeding to the Regional Director to schedule a hearing

before an administrative law judge, which ... shall be limited to taking evidence concerning the wage rate of Joseph Bauer and the interim earnings of Joseph Bauer, Richard Chapdelaine, Montana Boyd, Ron Butcher, Jim Gates, Scott Green, Kathy Hambley, Roger Hambley, Richard Harris, Ken Juhnke, Don Martin, Patty Martin, Kelly Quinn, Steve Rodriguez, Gary Trimp, and Tom Yelton.

I accordingly conducted a hearing in Missoula, Montana, on March 29, 1990.

II. The Backpay Specification

The specification as first issued alleged that Respondent's "obligation ... will be discharged" by paying the following amounts:[3]

Joseph Bauer	$1,740
Richard Chapdelaine	1,309
Montana Boyd	1,869
Ron Butcher	2,430
Jim Gates	2,203
Scott Green	2,637
Kathy Hambley	1,405
Roger Hambley	2,069
Richard Harris	1,325

[3] Plus interest accrued to the date of payment, less taxes withheld in keeping with federal and state law.

Ken Juhnke	1,734
Don Martin	2,309
Patty Martin	3,732
Kelly Quinn	2,113
Steve Rodriguez	2,285
Gary Trimp	2,402
Tom Yelton	1,084

The original specification further alleged that Bauer's entitlement assumed an hourly wage of $7.50.

On March 2, 1990, the Regional Director amended the specification to state that the claim on behalf of Montana Boyd thereby was "withdrawn" because his entitlement was fully offset by interim earnings; and, on March 6, the Regional Director again amended the specification, alleging that Joseph Bauer's hourly wage was $5.75, not $7.50, reducing his entitlement from $1,740 to $1,334. The $5.75 corresponds with the rate provided by Respondent in its dismissal motion to the 9th Circuit.

III. The Missing Claimants

By letter to Respondent dated March 6, 1990, counsel for the General Counsel stated that Region 19 had been unable to locate Ron Butcher and Jim Gates to inquire into their

interim earnings. The letter continued that, should their whereabouts remain unknown, any payments made by Respondent in discharge of its obligation to them would be put in escrow for a year, after which the funds would "revert to" Respondent. Further in this vein, counsel for the General Counsel represented during the hearing that he had yet to find Butcher and Gates, and "requested[ed] that the escrow procedures be used with respect to them."

IV. The Issues as Defined by the Board

A. Bauer's Wage Rate

As noted above, the Regional Director amended the specification on March 6, 1990, to allege that Bauer's hourly wage was $5.75. Inasmuch as this figure matches that Respondent gate to the 9th Circuit, I find that it is correct, that the calculations in the amended specification based on it likewise are correct, and that Bauer's entitlement therefore is $1,334, as now alleged.

B. Interim Earnings

The burden of proof is upon the General Counsel to establish the claimants' gross backpay entitlements, after which the burden shifts to the wrongdoer "as to diminution of damages," including interim earnings.[4] Respondent declined, during the hearing, to come forward with any evidence on the issue of interim earnings.

I conclude, therefore, that the claimants' entitlements are as set forth in the specification as now constituted.

---

[4] Mastro Plastics Corporation, 136 NLRB 1342, 1346 (1962).

Appendix G

RECOMMENDED SUPPLEMENTAL ORDER[5]

Respondent, McDonald Corporation d/b/a Norco Products, its officers, agents, successors, and assigns, shall make the following claimants whole by paying them these amounts, less taxes appropriately withheld:

Joseph Bauer	$1,334
Richard Chapdelaine	1,309
Scott Green	2,637
Kathy Hambley	1,405
Roger Hambley	2,069
Richard Harris	1,325
Ken Juhnke	1,734
Don Martin	2,309
Patty Martin	3,732
Kelly Quinn	2,113
Steve Rodriguez	2,285
Gary Trimp	2,402
Tom Yelton	1,084

---

[5] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Respondent shall, in addition, place certain amounts in escrow for Ron Butcher and Jim Gates, as follows:

Ron Butcher	$2,430
Jim Gates	2,203

The amounts due Butcher and Gates shall be paid to the Regional Director for Region 19, to be held in escrow for a period not to exceed one year. The one-year escrow period shall begin upon Respondent's compliance by payment of the backpay for deposit into escrow or the date the Board's supplemental decision and order becomes final, including enforcement thereof, whichever is later.[6]

---

[6] Starlite Cutting, 284 NLRB 620 (1987).

All of the above amounts shall be with interest, to be computed as prescribed in New Horizons for the Retarded.[7]

Dated: May 2, 1990

Richard J. Boyce
Administrative Law Judge

[7] In accordance with New Horizons for the Retarded, 2283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1987 amendment to 26 U.S.C. §6621.

JD(SF)--47--90
Missoula, Montana

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

AND CASES 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 2
AFL-CIO

ORDER DENYING MOTION TO STRIKE

While acknowledging the technical validity of Counsel for General Counsel's motion dated April 23 to strike Respondent's "Exceptions and Brief," I hereby deny said motion to ensure that any reviewing forum have full access to Respondent's position and arguments.

Richard J. Boyce
Administrative Law Judge

Dated: May 2, 1990

Appendix H
Order of the United States Court of Appeals for the Ninth Circuit dated November 29, 1991, denying petition for rehearing of it's September 11, 1991, Order

FILED, NOV 29, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner	)	
v.	)	No. 90-07612
	)	NLRB No. 19-CA-18986
USA McDONALD CORPORATION d/b/a NORCO PRODUCTS, Respondent	)	ORDER

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

The petition for Rehearing has been considered and is DENIED.

Appendix I
January 5, 1989, Backpay Specification and Notice of Hearing

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION NO. 2,
AFL-CIO

BACKPAY SPECIFICATION AND NOTICE OF HEARING

The National Labor Relations Board, having, on May 31, 1988, issued its Decision and Order directing Respondent, USA McDonald Corporation d/b/a NORCO Products to make whole certain of its employees for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1)(3) and (5) of the Act, the Court of Appeals for the Ninth Circuit having, on December 1, 1988, entered its Judgment enforcing in full the backpay provisions of the Board's Order herein and controversy having arisen over the amount of backpay due under the terms of the Board's

Order, the Regional Director of the National Labor Relations Board for Region 19, pursuant to authority duly conferred upon him by the Board, hereby issues this Backpay Specification and alleges that the backpay due under the Board's Order as enforced by the Court of Appeals for the Ninth Circuit is as follows:

1.

(a) The quarterly gross backpay for each discriminatee with the exception of discriminatees Bauer and Chapdelaine is the product of the individual average daily gross earnings for days actually worked by the discriminatees laid off on March 6, 1987 during a representative period from February 1, 1987 through March 6, 1987, multiplied by the number of working days thereafter in each calendar quarter until their date of recall.

(b) The quarterly gross backpay for discriminatees Bauer and Chapdelaine is the product of their respective hourly wage rates prior to layoff multiplied by an average eight hours per work day which product is multiplied

by the number of work days in each calendar quarter which they missed as a result of the delay in their recall from layoff.

2.

Net interim earnings, if any, for each discriminatee consists of their gross earnings during such quarter offset by any expenses incurred during such quarter in searching for or traveling to work at such interim employment.

3.

Calendar quarter net backpay is the difference between calendar quarter gross earnings and calendar quarter net interim earnings, if any.

4.

The total net backpay due each discriminatee is the sum of the calendar quarter amounts of net backpay due that discriminatee.

5.

(a) The backpay period for the discriminatees other than Bauer and Chapdelaine is the period from their

respective layoffs on March 6, 1987 until the date each was called back to work. Those return dates are summarized as follows:

Robert Hambley	5/7/87
Kelly Quinn	6/3/87
Scott Green	6/1/87
Ron Butcher	6/3/87
Ken Juhnke	5/27/87
Montana Boyd	5/28/87
Patty Martin	6/29/87
Gary Trimp	6/5/87
Don Martin	5/27/87
Kathy Hambley	6/1/87
Thomas Yelton	4/13/87
James Gates	6/3/87
Richard Harris	6/1/87
Steve Rodriquez	6/1/87

(b) The backpay period for Joe Bauer and Richard Chapdelaine begins on the average date at which other similarly situated employees who were not found to be the subject of discrimination as to recall were recalled to work and ends with their actual recall. The backpay period for these two discriminatees is as follows:

Joe Bauer	6/4/87 until 7/15/87
Richard Chapdelaine	6/4/87 until 7/24/87

Bauer's hourly wage for purposes here relevant was $7.50 per hour and Chapdelaine's was $5.00.

7.

Annexed hereto as Exhibits 1(a) through 16(b) and by this reference incorporated herein are computation of backpay forms, NLRB Form 4312, for each of the sixteen discriminatees for each relevant calendar quarter reflecting computation of alleged gross backpay, admitted net interim earnings, if any, and net backpay for each such relevant calendar quarter. Summarizing the facts and calculations specified above and on the attached exhibits, the obligation of Respondent to make whole the discriminatees under the Board Order and Court Judgment will be discharged by payment to the individuals named below of the amounts set opposite their names, plus interest accrued to the date of payment pursuant to such Order and Court Judgment, minus the tax withholding required by applicable Federal and State laws.

Roger Hambley	$2,069
Scott Green	2,637
Ken Juhnke	1,734
Patty Martin	3,732
Don Martin	2,309
Thomas Yelton	1,084
Richard Harris	1,325

Kelly Quinn	2,113
Ron Butcher	2,430
Montana Boyd	1,896
Gary Trimp	2,402
Kathy Hambley	1,405
James Gates	2,203
Steve Rodriquez	2,285
Joe Bauer	1,340
Richard Chapdelaine	1,309

PLEASE TAKE NOTICE that on the 21st day of March, 1989 at 9:00 a.m. in Missoula, Montana, at a place to be determined later, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Specification, at which time you will have the right to appear in person, or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED, that pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondent shall, within 21 days o f service of the Specification, file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to the Specification. To

the extent that such Answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations and the failure to do is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

DATED at Seattle, Washington this 5th day of January 1989.

/s/ JOHN D. NELSON

JOHN D. NELSON , Regional Director
National Labor Relations Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

Appendix J
March 2, 1990, Amendment to Backpay Specification and Notice of Hearing

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS. WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 2 AFL-CIO

AMENDMENT TO BACKPAY SPECIFICATION AND NOTICE OF HEARING

On January 5, 1989, the undersigned Regional Director issued a Backpay Specification in the above titled case. At that time, six of the named discriminatees had not yet provided information with respect to their interim earnings in the relevant period, and the exhibits attached to the Specification therefor reflected that fact. Four of the six have since provided the required information, but General Counsel is, as of this date, unable to contact the remaining two. Accordingly, the Backpay Specification is hereby amended with respect to the interim

earnings of the four individuals who have provided data since January 5, 1989 in the following particulars: 1. Roger Hambley (Exhibit 1), Thomas Yelton (Exhibit 6), and Gary Trimp (Exhibit 11) have each reported that they had no interim earnings during the relevant period. Thus, the comments in each of those exhibits should be amended from "Interim Earnings Not Yet Reported" to read "No Interim Earnings." The net backpay figures stated for these individuals will remain unchanged. No separate answer to these allegations is required. The interim earnings figures for these individuals will be taken as denied. 2. Montana Boyd (Exhibit 10) has reported interim earnings for each quarter which are in excess of his gross backpay for those periods. Accordingly, his net backpay for each quarter and the claim is zero. Exhibit 10 for backpay in the amount of $1,896.00 for Montana Boyd reflected at paragraph 7, page 4 of the Specification are

hereby withdrawn. 3. The discriminatees with respect to whom General Counsel still has no interim earnings data are James Gates (Exhibit 13) and Ron Butcher (Exhibit 9).

On February 23, 1990, the National Labor Relations Board ruled upon a Motion for Summary Judgment in this matter and ordered that a hearing be held before a duly designated Administrative Law Judge on the remaining issued raised by the Specification, accordingly

PLEASE TAKE NOTICE that on the 29th day of March 1990 at 9:00 a.m. in the Conference Room, Public Defenders Office, 317 Woody Street, Missoula, Montana a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the remaining issues in the above referenced Specification as hereto amended as directed by the Board, at which time you will

have the right to appear in person, or otherwise, and give testimony.

DATED at Seattle, Washington this 2nd day of March 1990.

JOHN D. NELSON

John D. Nelson, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

Appendix K(1)
Petitioner's Pro Se Letters and Pleadings to NLRB
January 25, 1989, Letter to Walter J. Mercer, Regional Attorney, NLRB

January 25, 1989

Walter J. Mercer
Regional Attorney
National Labor Relations Board, Region 19
Henry M. Jackson Federal Building - Room 2948
Seattle, WA 98174

RE: Cases 19--CA--18986 and
19--CA--19184

Dear Mr. Mercer:

This letter is in regards to our telephone conversation on case law which the board is attempting to apply to the above captioned cases. I don't believe the Lapeer case fits the circumstances for NORCO PRODUCTS.

After reading through the Lapeer case I thought I should mention a couple problems about using this case and write the list of cases I would also like to review. Labor Law being what it is, there is no question the "one more rule" applies i.e., if there is one case, then there is always one more case the Board will think applies.

As I mentioned, I don't believe the Lapeer case fits the circumstances here at NORCO PRODUCTS. The theory and rational in Lapeer are substantially different. I talked to Don Albright when her was here about seasonality of this business and that some of the employees in the March layoff were hired as seasonal temporaries. Do you know if he even checked it out?

The basic theory surrounding the determination of when you must negotiate layoffs and when you don't need too, seems to hinge on whether or not the decision to layoff effects changes in the "terms of employment in order to reduce labor costs during a period of economic difficulty".

Layoffs at NORCO PRODUCTS are a well known term of employment. Regular employees as well as seasonal employees are subject to and have been laid off in past seasons. Regular employees have a guaranteed recall. Teamster representatives knew of pending layoffs and have testified they rushed to declare

themselves as the employees representative, toblock the first round of layoffs. The first round of layoffs was not found to be illegal.

Although we generally recall seasonal employees when work becomes available, seasonal temporary employees do not have a guaranteed recall provision. Layoffs at NORCO PRODUCTS are a given condition of employment for all employees. Everyone including the NLRB and Teamsters Union knew of the seasonality of this business. There was plenty of information about seasonality discussed with the Teamsters, Pat Dunham, Dale Perman and other NLRB employees. Even though the rules changed after the representation election, the terms of employment did not. Layoffs were a condition of employment that did not need to be negotiated. Evidence was provided to the NLRB that layoffs were in accord with established past practice.

Nine of the fourteen employees laid off in March were temporary employees at the time. All employees laid off in March were kept on board until after the election because of

comments made by Dale Perman in about allowing them the opportunity to vote. Richard Chapdelaine, a temporary employee laid off in that first round, had no provision for recall, yet Judge Pollack found that he was called back out of order. Although there was no provision for seniority, Joe Bauer who had a guaranteed recall provision was found to have been called back out of order.

The whole point here is NORCO PRODUCTS did not change the terms of employment by laying off employees and therefore never should have been under attack by the NLRB in the first place. The "failure to bargain the effects of the layoffs", ULP charge was not really a violation to begin with but it was alleged and we were found guilty. The rules require an employer to negotiate with the union before changing the working conditions in the bargaining unit. What if we had not given any temporary employees a courtesy call back? What if we had laid them off before the representation election?

All the information necessary to sort this out was available to your office well before the hearing. We practically begged you and John Nelson to get involved. Your attorney and investigators were out there creating a case. No one wanted to listen and no one wanted to solve problems. Pat Dunham was forwarding his philosophies and pursuing his labor career and wasn't interested in the facts, only in winning. The volume of input we provided to answer questions and solve problems has been incredible.

Pat Dunham, being a "good" labor attorney knew the only way to obscure the information was to destroy the company credibility. No one at the NLRB was interested in the facts, their minds were made up. NORCO PRODUCTS major fault was not understanding your court system and the tricks that would be used by your attorney. Your staff under your supervision was responsible for the damage that occurred. Your people were simply out to assist the union in their quest to install a teamster boiler plate contract in a small

right to work business, without negotiating. Your office in concert with the Teamsters Union, violated NORCO PRODUCTS, our employees and community in an act of gross malfeasance.

The Teamsters continue to refuse to bargain, and it's been over a year since the hearing and no one at the NLRB seems to be interested solving the problem. This leads us to conclude the system is sick and cannot be fixed. Therefore, your system is on trial.

Today, go back and read all correspondence. NORCO PRODUCTS has been asking and challenging everyone at the NLRB to get involved in solving the problems. It's time to stand up Walt! Don! Dale! Lynn! anyone? If you have any further comments or questions, please let me know.

I would like copies of the following cases:

Trans Marine Navigation Corp., (1968)
Franks v. Bowman Transportation Co., (1975)
Litton Business Systems, (Nov. 6, 1987)
NLRB v. Sandpiper convalescent Center, (4th cir 1987)
NLRB v. Advertisers Mfg. Co.
Hamilton Electronics Co. (1973)
Southwest Forest Industries, (1986)

cc: John D. Nelson
Ray Willms
Larry McCarter
Donald W. Albright
Dale Perman
Lynn Letwiler
James C. Sand
Michael Messitte
Joseph E. DeSio
Cathy A. Catterson
Judge Tang
Judge Fletcher
Judge Thompson

Appendix K(2)
Petitioner's Pro Se Letters and Pleadings to NLRB
January 26, 1989, Letter to
Walter J. Mercer, Regional Attorney, NLRB

January 26, 1989

Walter J. Mercer
Regional Attorney
National Labor Relations Board, Region 19
Seattle, Wa 98174

Dear Mr. Mercer:

I received your letter of January 23, 1989 in yesterday afternoon's mail. I also received a letter from James C. Sand, Council for the General Council.

Your presumption that my letters of January 17, and January 18, 1989 are in response to the backpay Specification, is correct. I'm sure you understand we have a problem with the implications of your backpay specification. In this letter I will respond to your letter and to the letter and concerns of Mr. Sand. This letter and the enclosures should be considered a supplement of the above noted letters and hopefully will meet the Board's Requirements. Please provide a copy

of the appropriate documentation of the board's requirements, rules or administrative guidelines of which you expect NORCO PRODUCTS to comply. It may be helpful to know what you wish to receive, I trust I will be allowed to amend for clarification if necessary.

Regarding your comment, "I am not interested in prolonging what has already been a rather lengthy discussion (both in writing and orally) over these cases". You couldn't have said anything that I would more readily agree with. Please understand I recognize it is within the authority of Region 19 (John Nelson and you), to put an end to this foolishness. Unfortunately, you are now on the record trying to explain away what you and I both know is a bunch of nonsense. Now I'm in a position where I must continue the discussion to counter your comments for the record.

For the record, I'm not asking you or anyone else to reverse the 9th Circuit Court or the National Labor Relations Board. We both know that you have no control in that

decision. Our ability to solve it through appeal was very cleverly stifled by Pat Dunham. You lost control of that issue when you allowed Bob Stange and Pat Dunham to proceed to hearing rather than settle before the hearing.

Do you remember the negotiation about a possible Trans Marine remedy? At that time NORCO PRODUCTS wanted to settle this issue for nuisance value. I've spent a lot of time, effort and attorney fees attempting to get to an understanding. That unfortunate travesty is over and now we are into the compliance arena. How much more "competent attorney" time do you think I should spend? With the resources of the Federal government you can talk everyone clear to bankruptcy.

In compliance you and John Nelson have the power to continue the travesty or to resolve the problems. NORCO PRODUCTS has complied with all necessary issues in this case. In compliance, all you have left is to determine, "Backpay if any, is due". You and I both know

the latitude your committee has. The "if any" question can be answered by a straight forward NONE DUE.

You assert that, "while a number of individuals have reviewed this matter, including Donald Albright and Supervisory Compliance factually convinced that your assertions with respect to the basic unfair labor practice cases are correct." If this is to be necessary to call, Mr. Donald Albright, Mr. Dale Perman, Mr. Pat Dunham, Mr Larry McCarter, Ms. Kathy Shelton and Ms. Gretchen Lumbley to testify at the hearing, regarding their understanding of facts surrounding the issues of disagreement regarding "backpay due if any". I hereby also request that you provide a list designating the names of the "number of individuals" you allege, "have reviewed this matter".

Please provide the information necessary that I may proceed within your rules and guidelines to call these NLRB employees. If these procedures are lengthy in nature please be advised that I am requesting John Nelson,

Regional Director, to confirm in writing by agreement of the parties, under Rule 102.16, a-1 to allow the hearing date be adjusted thereby providing the opportunity for the testimony to be taken. If a response and confirmation is not received I will file with the appropriate administrative law judge or judges.

In your attempt to comply with the courts decision to make employees whole, you have not yet determined if the employees were actually damaged by illegal activities stated in the decision, (to what extent are they not currently whole?) and what if anything is necessary to make employees whole. It is my contention that your investigation of the facts on record has recognized the Judge erred when finding NORCO PRODUCTS guilty.
Therefore, you had little case other than to find and demonstrate by other case law, some rational not considered by the judge upon which you can rightfully or wrongfully sustain a claim.

Walt, it's time for you to do your homework. The employees were not damaged by the alleged acts. Show me what your investigation really determined. The truth is, there is no factual evidence upon which you can base a damage claim. If your committee has information from the factual record that proves anything the judge found, then use it to base your calculation. The hearing was nothing more than a nice piece of attorney work by Pat Dunham, wasn't it? Allegation on top of allegation. Your approach to prosecute rather than to solve the problems has gone beyond my imagination and patience.

Regarding your specific responses to my letter:

1. I'm amazed to hear you read John Dean's book, but I presume number 1. means you are not going to proceed with any action against employees for their conduct in this case. This is in the true character of Elizabeth Kinney, did you read her letter? The next

time you talk to Elizabeth ask her if she read John Dean's book.

2. I'm not up on what Pat told you about his comments to Jim McDonald regarding union security and his position regarding signing a contract without union security. Would you like to share with me? Did you ever get into the discussions about creating a ULP to justify a ULP strike? Read the court record on the first day where Pat was still trying to pull off Gretchin's recommendation about union recognition. You know and I know he was trying to amend the complaint at the hearing. The strike occurred, the ULP failed and Pat badly needed to amend the claim with a ULP to justify the strike. This was a major issue at the beginning of the hearing. Do you thing Pat was stupid? He knew what was necessary under Montana Law to entitle the striking workers to unemployment benefits. Don't you think he and McKittrick discussed this? McKittrick lucked out using the NLRB brief in the state unemployment hearing only because

the Montana Department of Labor was willing topay striking workers benefits contrary to Montana Law. It's incredible what a credibility ruling can do. We are at appeal with the state also. Are you following how that's going here in Montana? The whole case is incredible! How do you think it would all come out if an outside agency investigates?

If you are truly "neither interested in injuring NORCO nor furthering any alleged conspiracy by any labor union", then solve the problem. NORCO PRODUCTS is certainly not interested in being injured any further. It's your circus and you're the ringmaster. You know and I know that you are the one who can fix the problem. Also, I concur that the union security is not an issue for the backpay hearing.

3. I recognize and understand your comment urging us to, "employ experienced council if this matter is not settled". As you know if this issue is not is not settled before the hearing, council or no council it will be a major problem. Your suggestion that, "since

the proposed liability is not relatively large NORCO might be well advised to treat this as a business expense and put this litigation behind you", is absurd. I like your recommendations, but who is going to pay for all this? Your an attorney, explain to me what "not relatively large" means. Compared to what, is it larger than a breadbox and smaller than a coffin? Is it "not relatively large" compared to the damage and destruction already done to this company, interstate commerce, the employees and the community. Do I need to recap for you the lost jobs, the loss of gross sales per year, the cost of legal fees. Tell me Walt, who really is being violated here? This is all being paid for in lost production and deterioration of this business. Do you understand the economies of how this works? I'm sure we discussed this before under the subject of destroying us.

For the record and I have explained to you before, this is not a money issue. You can stop this travesty if you choose. We will continue to defend our position as long as we

have the means to resist. The cost has already been monumental. Do you wish me to recap what I call monumental? We will not yield to extortion regardless how "not relatively large" it is.

4. Regarding Examiner Don Albright's "extensive investigation" I would like to know specifically what was the scope of his examination and what results did it yield. Further, what earlier decisions are you in reference to, claiming that I "suggest, to ignore". I suggest you ignore nothing. What I request is that you determine and show proof: 1. if the employees were damaged by unlawful acts, 2. if so the extent of the damage, and 3. if not, reduce the backpay claim to zero. Can you handle that?

I understand your conclusion, agree and believe that settling the backpay issue without further expense is an absolute must. NORCO PRODUCTS' position has not changed. We have been telling you all along that it's time to find a solution rather than continue to perpetuate this travesty of justice. Thus

far, the NLRB's position, has been expressed as, to paraphrase Pat Dunahm when he was talking to Bob Stange on the telephone the morning the hearing, We are not interested in settling, we can get em by going to trial. Is your position different now?

Now it sounds like you're asking us to settle, "without further expense to the National Labor Relations Board or NORCO". Kind of ironic isn't it, but I'll accept your offer, if you settle now without further expense to the National Labor Relations Board or NORCO. Only Region 19 can solve this problem that easy. Region 19 created the problem and now you get to fix it. Please reread my letter of January 18, 1989 addressing this issue. My letter specifically states in the first sentence, "This letter is in response to the NATIONAL LABOR RELATIONS BOARD NOTICE, FORM NLRB-4338, dated January 5, 1989. Your FORM NLRB 4338, provides notice that you can dispose of this issue by agreement of the parties. My letter of the 10th is a request that the backpay

specification be disposed of by agreement of the parties. You know what you have here, I can't get much more specific.

I understand why you must be on the record advising me to seek competent legal assistance but let's be serious, NORCO PRODUCTS has provided everything you could possibly need to solve the problem. We do not need defense unless you intend to further deface us. We sent information, copied records, wrote detailed explanations, everything. You chose to go around what we provided and found ways to prosecute and discredit the company. Are you so determined to prosecute that no other alternative is available? We've been through this on the telephone. Let me know if you want specific written information on this issue.

Next, I'll address the issues in Mr. Sand's Letter. I will make every attempt to provide sufficiently specific information to eliminate doubt from your mind and his. Is there really any left, as to where we stand on the backpay issue currently in compliance?

Please reread my letter of January 17, 1989, and have Mr. Sand reread it. It is very specific, in the first sentence it states, "This letter is in response to your issuance of the back pay specification of January 5, 1989". Further stated in the same letter, "NORCO PRODUCTS does not concur with Region 19's position on the above captioned cases", and "NORCO PRODUCTS does not agree to pay in accordance with the back pay specification".

After talking to you some time ago, about the compliance process, and we have talked extensively, I was under the distinct impression that NORCO PRODUCTS would have the opportunity to provide comment, discuss the facts, review the findings, etc. before the backpay specification was issued. This opportunity was not afforded us. You slipped us a Lapeer!

I believe Don Albright, in his attempt to make calculations, found there was no factual evidence upon which he could measure damage if any to the employees stemming from the alleged wrongdoing of NORCO PRODUCTS and therefore no

basis upon which to issue a specification to "MAKE THEM WHOLE". WE'VE BEEN ALL THROUGH THIS WALT. The NLRB committee then decided to find another case in an attempt to sustain your erroneous position. I do not concur with that case, (Lapeer).

The backpay specification is faulty in several respects:

1. NORCO PRODUCTS does not concur that, "the backpay period for discriminates other than Bauer and Chapdelaine is the period from their respective layoffs on March 6, 1987 until the date each was called back to work". The <u>if laid off, then NORCO PRODUCTS-pays</u>, mentality cannot be legitimately applied. Such mentality will pay the unworthy with the worthy, if they exist. The order was to make whole, not pay em all and pay em everything. To make whole is plainly an order to pay for damage. It was not determined if NORCO PRODUCTS should have negotiated layoffs, nor was it demonstrated which employees if any should have been the subject of negotiations.

Specifically, NORCO PRODUCTS does not concur with the application of new found case law (Lapeer) which was provided by Mr. DeSio. The Lapeer case is not applicable to the conditions of the NORCO PRODUCTS case.

2. NORCO PRODUCTS does not concur that the people who are listed as discriminates are in fact discriminates or if they were damaged. There has been no determination of damaged or the extent damage to anyone by alleged wrong doing by NORCO PRODUCTS. You have failed to state the basis upon which a claim can be granted.

3. NORCO PRODUCTS does not concur with payment to temporary employees who should have been laid off prior to the organization election. Temporary employees were laid off when no further work was available. We did not have to keep them on for the election. They did not have a right to recall nor was it necessary to negotiate the effects of their layoffs. No determination has been made regarding employees who could or could not be laid off without negotiating and who did or

did not have the right to recall. No determination has been made as to damage suffered from the alleged wrongdoing of NORCO PRODUCTS. You have failed to demonstrate damage occurred and therefore, there is no basis for a "make whole" claim which can be granted.

4. NORCO PRODUCTS does not concur with payment to laid off employees who were regular employees and who should have been laid off before the election. Some of which were alleged to have been laid off when work was available, "cuts were too deep". No determination has been made as to, who if anyone was damaged by the alleged wrong doing of NORCO PRODUCTS. It has not been determined which regular employees should have been laid off and which should not have been laid off. It was not determined who was laid off "too deep", only alleged. You have failed to demonstrate who if anyone, was damaged and "if any" backpay is due. You have failed to state a claim upon which relief can be granted.

5. NORCO PRODUCTS does not concur on the theory or calculations used for Chapdelaine and Bauer, as it has not been determined if they were to be called back and if they were to have been called back, when should they have been called back. One was a seasonal temporary employee, alleged to have been called back untimely and he didn't even have a recall provision. The other employee was alleged to have been called back untimely and there was no seniority provision. Past practice was used in both instances and the past practice is well known and a part of the record. There was no allegation regarding legality of their actual layoffs and there is no factual basis to calculate a claim on these two employees.

6. Walt, how much of this do you need? There is a substantial amount of unfounded allegation in this case and now that you need the facts they are not present. I have been lead to believe that compliance is where we sort these things out. I have been telling you and everyone who will and even those who

won't listen, sort it out and the board will recognize the whole case is built on lies, innuendo and deception. Pat Dunahm and his investigators cheated, lied, discredited and beat us because we didn't defend ourselves in your system. You, John, Don, Dale, Ray and others now recognize where you are and that why you are trying to rely on Lapeer. You can't hide from it any longer. I'm not going to walk away from this monumental attack on this company and allow you to continue this boondoggle. How long is it going to take you to figure it out?

NORCO PRODUCTS hereby denies: 1. all backpay claims made against this company, 2. and denies appropriateness of the rational, etc. and case law which has been applied to support such backpay claims. 3. and NORCO PRODUCTS hereby includes by amendment, Section 102.54 of the Board's Rules and Regulations and per such rules specifically denies any and all allegations of liability in the backpay specification filed January 5, 1989, against this company.

Please use my letter of January 25, 1989 to you and my letter of January 25, 1989 to Donald Albright to further supplement my objection to the backpay specification.

If for any reason you do not feel the issues have been stated with enough clarity please let me know. I will expand define and clarify until you get the point. James M. McDonald, President of NORCO PRODUCTS concurs. I hereby request copies of NLRB Rules and Regulations 102-45 through 103-54.

I think it's interesting to point out that Mr. Sand in his one paragraph letter, is the first person ever to imply that anyone at NORCO PRODUCTS isn't being specific enough. I personally have <u>never</u> written a one paragraph letter. I SUSPECT HE IS NEW TO ALL THIS. I recommend that you retain "Experienced Council".

If you think you are tired of listening, imagine how tired I am of talking. When are you going to call a halt to this travesty? If

you have further comment or questions please let me know, I will respond.

Sincerely,

NORCO PRODUCTS

Ronald E. Preston
Operations Manager

Enclosures

cc: John D. Nelson
Ray Willms
Larry McCarter
Donald W. Albright
Dale Perman
Lynn Letwiler
James C. Sand
Michael Messitle
Randall Frey
Joseph E. DeSio
Cathy A. Catterson
Judge Tang
Judge Fletcher
Judge Thompson

Appendix K(3)
Petitioner's Pro Se Letters and Pleadings to NLRB, Petitioner's February 16, 1989, Pro se Motion to Dismiss, addressed to United States Court of Appeals for the Ninth Circuit

February 16, 1989

Cathy A. Catterson, Esquire
Clerk, United States Court of
Appeals for the Ninth Circuit
P.O. Box 547
7th & Mission Streets
Second Floor
San Francisco, CA 94101-0547

RE: No. 88-7284
NLRB v. USA McDonaldCORPORATION d/b/a/
NORCO PRODUCTS
(9TH CIR.)
Board Case Nos. 19-CA-18986
19-CA-19184

Dear Ms. Catterson:

I hereby submit the enclosed motion to dismiss in response to backpay claim made by Region 19 of the National Labor Relations Board, in the above captioned cause.

The motion is being submitted in accordance with NLRB Rules Before the Board (102.16 - 102.24) and The National Labor Relations Act, Section 10(c) & (d). This action was prompted by Region 19's continuing assertions regarding their lack of authority and refusal to address this issue. The Board clearly has authority

under the National Labor Relations Act and their Procedures Before the Board, R&R Sec. 102.49 - 102.51, and they simply chose to disagree without justification.

If you have any questions, please feel free to call, thank you.

Sincerely,

NORCO PRODUCTS

Ronald E Preston
Operations Manager

cc: Walt Mercer
John Nelson

Appendix K(3)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James McDonald and Ronald E. Preston
U.S.A. McDonald Corporation,
d/b/a NORCO PRODUCTS
P. O. Box 4227
Lower Blue Mountain Road
Missoula, MT 59806

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
v.	)	No. 88-7284
	)	
U.S.A. McDonald Corporation	)	MOTION TO
d/b/a NORCO PRODUCTS	)	DISMISS
	)	

Before:

THIS CAUSE was submitted to this Court upon an application for enforcement of an order of the National Labor Relations Board, dated May 31, 1988, against Respondent U.S.A. McDonald Corporation, d/b/a/ NORCO PRODUCTS, Missoula, Montana, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the record of the Board as Case Nos. 19-CA-18986 and 19-CA-19184. The Respondent having considered facts and circumstances surrounding the findings and order by NATIONAL RELATION BOARD JUDGE Pollack, chose not to file and answer within

the time provided by the Court. The NATIONAL LABOR RELATIONS BOARD on August 31, 1988, mailed to this court a motion for judgement by default under rule 15 (b) of the Federal Rules of Appellate Procedure. This Court issued an "Order" granting said Motion, copy attached hereto as Exhibit A.

Thereafter:

The aforementioned Cause No. proceeded ir compliance wherein U.S.A. McDonald Corporation, d/b/a NORCO PRODUCTS, has complied with all aspects of the NINTH CIRCUIT COURT's Order with the exception of the "Make whole" issues of paragraphs 2.(a) and 2.(b) of the Order. The "Remedy" stated and this Court upheld that NORCO PRODUCTS shall, "Make whole all 14 bargaining unit employees laid off on March 6, 1987 for any loss of pay they may have suffered as a result of the unlawful layoff," emphasis added.

It was understood and agreed between Region 19 NLRB and NORCO PRODUCTS, the "Make whole" issues would be investigated and analyzed by

Region 19 during compliance. Region 19 was to review the factual record, do analysis to specifically determine damage and assess "backpay due if any" to "Make whole" the employees who "may have suffered damage", and accordingly were to prepare a "Backpay Specification". It was further understood that NORCO PRODUCTS would be allowed the opportunity to provide input and discuss the facts surrounding backpay liability if any, and be involved in providing an equitable solution, thereby allowing NORCO PRODUCTS the opportunity to mitigate damages if any were determined. Such authority of the board is clear under their Procedures Before the Board, R&R Sec. 102.49 and 102.51. It was further understood, all else failing, if a solution could not be reached the Board would be compelled to state and defend its claim, based on the factual record, at a backpay hearing.

Region 19 of the NLRB has failed and refused to provide NORCO PRODUCTS information resulting from their investigation and analysis. Region 19 NLRB then issued a

"BACKPAY SPECIFICATION AND NOTICE OF HEARING," attached hereto as Exhibit B. In such backpay specification Region 19 of the NLRB has failed to provide a basis for the stated claim. Such claim is not consistent with the Administrative Law Judge's "Remedy" upheld by this Court. Region 19 NLRB has failed to provide basis from the factual record that any loss from wrongful acts was suffered and that any employee is not currently whole. Recognizing the factual record, Region 19 NLRB failed to properly act under Section 10(c) & (d) of the National boar Relations Act and failed to properly act under Procedures Before the Board, R&R Sec. 102.49, 102.50 & 102.51. In fact Region 19 NLRB continuously denied their authority in this area and thereby denied NORCO PRODUCTS of due process. Region 19 NLRB has failed to act consistent with the Order of the Ninth Circuit Court. Copies of letters attached hereto as exhibit C.

In response to the Backpay Specification NORCO PRODUCTS answers as follows.

Appendix K(3)

1. NORCO PRODUCTS denies paragraph 1(a) and (b) of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," in that Region 19 of the NLRB, has failed to demonstrate from the factual record, any damage that Bauer and Chapdelaine may have suffered by unlawful acts of NORCO PRODUCTS during the period stated. Such failure to determine damage and an appropriate period of damage caused failure to appropriately provide the basis for calculation on Bauer and Chapdelaine. Region 19 NLRB has failed to state a claim demonstrating damage which "they may have suffered", for which Bauer and Chapdelaine can be "made whole". NORCO PRODUCTS further denies, the period from February 1, 1987 through March 6, 1987 is a "representative period" upon which to base any calculation, since the factual record clearly demonstrates Chapdelaine and Bauer were legally laid off per past practice during a portion of the "representative period". Chapdelaine was a seasonal employee who had never worked in the

"representative Period". Further, the factual record also historically shows this period of the year to be the season of layoffs.

2. NORCO PRODUCTS denies paragraph 2 of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," regarding the "Net interim earnings" definition, in that Region 19's basis for calculation is being erroneously adjusted for normal work related expenses.

3. NORCO PRODUCTS denies paragraph 3 of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," regarding the "Calendar quarter net backpay" definition, in that Region 19's definition in part is based on false premises in "net interim earnings".

4. NORCO PRODUCTS denies paragraph 4 of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," regarding the "total net backpay due" definition, in that Region 19's definition in part is based on false premises. It should state backpay due "if any".

5. NORCO PRODUCTS denies paragraph 5 (a) and (b) of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," in that Region 19 has

failed to demonstrated from the factual record the extent to which employees are not currently whole. Such liability "if any" must be determined in order to make an employee whole. Region 19 failed to identify specific liability for each employee and state a claim demonstrating damage. Some of the employees noted in paragraph 5(a) were seasonal without recall provision. The factual record demonstrates surplus labor before and after the layoffs and that all employees were laid off and recalled per past practice regardless of recall provision. Further, Region 19 has failed to show from the factual record, when Joe Bauer should have returned to work if other than the date when he returned, as he did not have a seniority date, and Region 19 NLRB has similarly failed to show when Chapdelaine should have returned to work if other than the date when he returned, as Chapdelaine did not have a right to recall. NORCO PRODUCTS further disagrees with Paragraph 5(b) in the arbitrary selection of "6/4/87 until 7/15/87" and "6/4/87 until

7/24/87" for Bauer and Chapdelaine respectively, as these time frames do not relate to any portion of the factual records relating to damage of these individuals. The dates do not correspond to the dates of layoff or the dates of recall for the above stated employees.

6. NORCO PRODUCTS denies paragraph 6 of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING," in that Joe Bauer's rate of pay was $5.75.

7. NORCO PRODUCTS denies paragraph 7(a) through 16(b) of the "BACKPAY SPECIFICATION AND NOTICE OF HEARING". Region 19 has failed to state appropriate basis for a claim upon which relief can be granted. Region 19 has refused and failed to provide or discuss the backpay liability if any or disclose information gathered on the issue. Region 19 has failed to state a claim specifying damages "they may have suffered as a result of the unlawful layoff," and Region 19 has failed to state a claim upon which relief can be granted. NORCO PRODUCTS hereby categorically

denies the claims made in the Region 19 NLRB backpay specification.

Therefore:

NORCO PRODUCTS hereby requests this Court to dismiss all remaining backpay issues in this cause and find NORCO PRODUCTS has complied in all respects with this Court's Order. NORCO PRODUCTS further seeks sanction against the National Labor Relations Board and requests this Court provide such sanction against the National Labor Relations Board for arbitrary and capricious conduct in this case.

DATED at Missoula, Montana this 16th day of February 1989.

_____

Ronald E. Preston, Operations Manager
U.S.A. McDonald Corporation,
d/b/a/ NORCO PRODUCTS
P.O. Box 4227, Lower Blue Mountain Road
Missoula, Montana 59806

_____

James M. McDonald, President
U.S.A. McDonald Corporation,
d/b/a/ NORCO PRODUCTS
P.O. Box 4227, Lower Blue Mountain Road
Missoula, Montana 59806

Appendix K(4)
Petitioner's Pro Se Letters and Pleadings to NLRB, Motion to Dismiss Backpay Specification and Objection to Motion For Partial Summary Judgement [sic], addressed to NLRB, dated February 16, 1989, with certificate of service on March 1, 1989

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

James McDonald and Ronald E. Preston
U.S.A. McDonald Corporation,
D/B/A/ NORCO PRODUCTS
P. O. Box 4227
Lower Blue Mountain Road
Missoula, MT 59006

USA McDONALD CORPORATION, d/b/a/ NORCO PRODUCTS	)	
CASES:	)	19--CA--18986
and	)	19--CA--19184
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMFERICA LOCAL UNION NO. 2, AFL,CIO	)	MOTION TO DISMISS BACKPAY SPECIFICATION AND OBJECTION TO MOTION FOR PARTIAL SUMMARY JUDGEMENT

COMES NOW, NORCO PRODUCTS, and moves for dismissal with respect to each and every allegation of the Backpay Specification and Appendices thereto, which issued on January 5, 1989. This motion is based upon the attached motion to the Ninth Circuit Court of Appeals, dated the 16th day of February and appended

hereto, and previously served on the Board. NORCO PRODUCTS submits this motion as Region 19 in filing the Backpay Specification, failed to appropriately state any basis for claim upon which relief can be granted.

FURTHER, NORCO PRODUCTS hereby files it's objection to Region 19's MOTION FOR PARTIAL SUMMARY JUDGEMENT UPON A BACKPAY SPECIFICATION, issued on the 14th day of February. Such motion was without merit and was filed to intentionally foreclose and deny NORCO PRODUCTS due process. Region 19 has been notified by NORCO PRODUCTS, in continuing correspondence and telephone conversation, regarding NORCO PRODUCTS' objection to the baseless Backpay Specification. Recognizing the factual record, Region 19 NLRB has failed to properly act under Section, 10(c) & (d) of the National Labor Relations Act and failed to properly act under Procedures Before the Board, R&R Sec. 102.49. 102.50 & 102.51. In fact, Region 19 NLRB continuously denied their authority to remedy this issue and thereby denied NORCO PRODUCTS of due process. Region

19 has refused and failed to provide Or discuss the backpay liability "if any" or disclose information gathered on the issue. Region 19 has failed to state a claim specifying damages employees "may have suffered as a result of the unlawful layoff," and thereby Region 19 has failed to state a claim upon which relief can be granted. NORCO PRODUCTS hereby categorically denies the claims made in Region 19's backpay specification.

Therefore:

NORCO PRODUCTS hereby requests the Board to dismiss the remaining backpay issues in the Backpay Specification as Region 19 of the NLRB has failed to state a claim upon which relief can be granted, and also find NORCO PRODUCTS has complied in all respects with the National Labor Relation Board's Order which was upheld by the Ninth Circuit Court of Appeals.

NORCO PRODUCTS further seeks sanction against the National Labor Relations Board, Region 19 and requests the Board provide such

against Region 19 for arbitrary and capricious conduct in this case.

DATED at Missoula, Montana this 16th day of February 1989.

Ronald E. Preston, Operations Manager
U.S.A. McDonald Corporation, d/b/a/ NORCO PRODUCTS
P.O. Box 4227. Lower Blue Mountain Road
Missoula, Montana 59806

James M.Donald, President
McDonald Corporation, d/b/a/ NORCO PRODUCTS
P.O. Box 4227, Lower Blue Mountain Road
Missoula, Montana 59806

Appendix L
Motion for Partial Summary Judgment Upon a Backpay Specification, filed by Counsel for General Counsel to NLRB, dated February 14, 1989

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

USA McDONALD CORPORATION, d/b/a
NORCO PRODUCTS

and

19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 2, AFL-CIO

MOTION FOR PARTIAL SUMMARY JUDGMENT UPON A BACKPAY SPECIFICATION

COME NOW, General Counsel, and moves for Summary Judgment with respect to each and every allegation of the Backpay Specification and Appendices thereto herein which issued on January 5, 1989 with the exception of those allegations relating to interim earnings of discriminatees, and consequently those allegations reflecting net backpay due. This Motion is based upon the affidavit of James C. Sand, Counsel for General Counsel, submittal herewith and the documents annexed thereto, as

more fully explained in the Memorandum submitted herewith.

Dated at Seattle, Washington this 14th day of February, 1989.

Very respectfully submitted,

James C. Sand
Counsel For General Counsel

Appendix M
General Counsel's Memorandum in Support of Motion for Partial Summary Judgment, dated February 14, 1989

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

USA McDONALD CORPORATION d/b/a NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 2, AFL-CIO

GENERAL COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

GENERAL COUNSEL, has filed a Motion For Partial Summary Judgment and supporting affidavit herewith. In substance, that Motion seeks summary judgment with respect to the gross backpay allegations of the Specification on the basis that Respondent has not provided an answer to those allegations with the specificity required by the Board. In fact, beyond a general denial that it owes anything, Respondent has not provided any answer which may be properly considered herein, at all.

Appendix M

Respondent, as evidenced by the original Decision, is a substantial company, and was represented by experienced labor counsel at the initial hearing, but, as demonstrated by General Counsel's Exhibit 2 and references in Exhibits 3(b), (d) and (h), has affirmatively elected not to seek counsel in this despite cautions by the Regional Attorney that it would be well-advised to do so.

General Counsel has made every effort to fully advise Respondent of its obligation to file a detailed answer, and of the cost of not doing so, twice extending the deadline by which such an answer might be filed. Note in particular in this regard, the forms attached to the Specification, itself, and acknowledged by Respondent in Exhibits 3(b) and (c); Exhibit 3(e) [acknowledged and responded to in Exhibit 3(h)], and, most particularly, Exhibit 3 (in) and the attachment thereto. Respondent's responses to those cautions are reflected in Exhibits 3(h) and (s).

In Exhibit 3(s), though received in Seattle in the ordinary course f the mails on February 13, the last day assigned for an answer to be received by General Counsel's second extension, [GC Ex. 3(m)] Respondent mockingly promises an answer "in legally sufficient" format as, "immediately forthcoming." If Respondent's representative had time to write this letter, he had time to file an Answer by this twice extended deadline. Counsel for General Counsel, nevertheless, waited until receipt of the mail on February 14, 1989 before submitting the Motion filed herewith. No further response was received, and General Counsel must now object to the filing of any answer hereafter as being untimely. however, in the event any further documentation is received it will be promptly forwarded in supplement to the materials submitted under affidavit herewith.

The sum and substance of what Respondent has said in its various communications is that it still disputes the underlying decision and order and takes umbrage at the performance of

the Board investigators, attorneys, supervisors, managers and compliance personnel who have had any hand in the processing of this case. None of that is relevant to a proper defense herein, nor can it be raised before or ruled on by the Administrative Law Judge assigned to hear this case.

Respondent has, to be sure, denied that the backpay periods or calculations are correct, but it has provided no alternative proposal, nor has it stated why the proposed periods are incorrect, beyond reiterating defenses about temporary employees and seasonal layoffs which have already been rejected by the Board and Appellate Court with respect to the General layoff of March 6, 1987 which covers 14 of 16 discriminatees. With respect to the two individuals legitimately laid off earlier but discriminated against in terms of recall, it argues only that they were not entitled to early recall - the very issue already decided, and suggests no alternate means for calculating the applicable date. In neither

case is this response sufficient to meet the Board's requirements.

The underlying decision finds that the layoff of March 6 was unlawful because the Respondent did not first bargain with the union. Lapeer Foundry and Machine, Inc., 289 NLRB No. 126 (1988) clearly sets forth the law in these circumstances, and precludes going behind the layoff to see if it was economically justified as Respondent has all along proposed we should. Respondent does not question the date on which the layoffs occurred or the date upon which individuals then laid off were recalled. It does not question the formula for calculating backpay which is based on data drawn from its own records. In these circumstances, gross backpay is clearly established by the pleadings and should be determined thereon.

So, too, with respect to the backpay for the two 8(a)(3) discriminatees, Bauer and Chapdelaine. The Respondent's letter raises questions about whether they have any right to come back by seniority or any expectation of

recall, at all. What the Administrative Law Judge found, and the Board and Court affirmed was that each would have been called back, and would have been called back sooner, but for animus toward their union activity during the organizing campaign. General Counsel has proposed a formula based on averaging the recall dates of other similarly placed individuals, not of any fixed seniority. Respondent has not suggested why an average would be incorrect or proposed any other method. General Counsel has used the pay rates of the individuals to determine backpay within the backpay period - a standard procedure. Respondent has not questioned the accuracy of those figures or suggested any other reason that the individual's pay rate is not appropriate here.

General Counsel does <u>not</u> seek summary judgment as to interim earnings. For that element of a backpay a general denial is accepted as sufficient. That being the case, of course, the net amounts due are still subject to litigation. However, given the

extensive opportunities Respondent has had and the detailed advice about its obligations has been given, the issues of backpay periods and gross backpay during those periods have not been properly put in issue upon any theory litigable herein, nor has there been any suggestion that any such issue is potentially forthcoming; wherefore, further proceedings should be foreclosed by an order granting partial summary judgment as prayed for herein.

In filing the motion submitted herewith, General Counsel recognizes that transfer to the Board and time for an order to show cause may result in loss of the original March 25 hearing date unless a prompt response to this motion may be obtained. However, General Counsel does pray for all possible expedition consistent with due process herein to avoid that result as this Respondent, by the foregoing correspondence has shown itself determined to delay and frustrate the Board's processes in every possible way, while the clear measure of harm to its employees has now already gone unremedied for two full years,

and in these circumstances must necessarily wait through many more procedural steps before relief can be effected.

Dated at Seattle, Washington this 14th day of February, 1989.

Very respectfully submitted,

James C. Sand
Counsel for General Counsel

Appendix N
Affidavit of James C. Sand,
Counsel for the General Counsel,
dated February 14, 1989
(exhibits omitted)
in support of motion for
partial summary judgment

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

USA McDONALD CORPORATION d/b/a
NORCO PRODUCTS

and

Cases 19--CA--18986
19--CA--19184

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND HELPERS
OF AMERICA, LOCAL UNION NO. 2,
AFL-CIO

AFFIDAVIT OF COUNSEL FOR GENERAL COUNSEL

COMES NOW, James C. Sand, being first duly sworn, and states as follows:

1. Annexed hereto as General Counsel's Exhibit 1 are the formal papers in this proceeding to date, including the Administrative Law Judge's Decision, the Board Order, Court Judgment, and Backpay Specification as well as an index of those documents.

2. Annexed hereto as General Counsel's Exhibit 2(a) and (b) are a letter from the undersigned to the Counsel who represented Respondent in the underlying unfair labor

practice proceeding and that Counsel's reply reflecting that, after consultation with Respondent's officials, he would not be appearing on Respondent's behalf in the backpay proceeding.

3. Annexed hereto as General Counsel's Exhibit 3 is a series of letters which have been exchanged between Mr. Ronald E. Preston, the Operations Manager for Respondent, and various persons at the Regional Office. The full correspondence is provided because a number of the letters cross-reference others. However, much of this correspondence does not relate directly to matters raised by the Backpay Specification. In certain of the letters from Mr. Preston, as indicated in the following detailed listing, the undersigned has highlighted with yellow marker those portions of the letters which might be taken as an answer to the Specification or as bearing on Respondent's determination to proceed without counsel in this matter. In sum, though directed to the Regional Attorney, General Counsel accepts these statements as a

general denial of the Backpay Specification, but not more. The specific documents provided are as follows:

(a) Letter from Field Examiner Donald W. Albright, who has been assigned to accomplish the compliance investigation and calculations, to Respondent dated December 28, 1988 (This letter is included only because it is later referred to by Mr. Preston).

(b) Respondent's letter of January 17, 1989 to Walter J. Mercer, Regional Attorney (highlighted). This letter includes a general denial, and, at pages 3-4 statements about readiness for hearing and that Respondent does not intend to use counsel.

(c) Respondent's letter to Mercer dated January 18, 1989 (highlighted). This letter reiterates a general denial that any backpay is due and attempts to base such response on the error of the original Administrative Law Judge's findings.

(d) Mercer's January 23, 1989 response to Exhibits 3(b) and (c). This letter generally addresses matters not here

relevant, but is later referred to. It should, however, be noted that at page 2, the Regional Attorney urges Respondent to obtain counsel skilled in labor relations if it is intent upon pursuing a defense herein.

(e) Letter from the undersigned to respondent dated January 23, 1989 in response to Exhibits 3(b) and (c) requiring a fuller answer and setting a revised date by which an acceptable answer must be received in order to avoid a motion for partial summary judgment.

(f) Respondent's letter to Albright dated January 25, 1989, which is relevant only in that it is referred to in later correspondence.

(g) Respondent's letter to Mercer dated January 25, 1989, which is relevant only in that it is referred to in later correspondence.

(h) Respondent's letter to Mercer dated January 26, 1989 (highlighted) which purports to respond to Exhibits 3(d) and (e). This letter, at several points clearly sets forth a general denial of the Specification,

demonstrates that the earlier letters and forms have been received and acknowledges, but rejects, the recommendation that Respondent seek counsel. Beginning at the foot of page 5, it undertakes a detailed response to the Specification specifically in response to Exhibit 3(e).

(i) Letter from Mercer dated January 27, 1989 acknowledging receipt off Exhibit 3(g). (Collateral relevance only.)

(j) Letter from Deputy regional Attorney Jensen to Respondent dated January 27, 1989 with respect to his request for copies of NLRB cases. (Collateral relevance only.)

(k) Letter from Albright to Respondent dated January 27, 1989 in response to Exhibit 3(f). (Collateral relevance only.)

(l) Letter from Mercer to Respondent dated January 30, 1989 in response to Exhibit 3(h). (Collateral relevance only.)

(m) Letter from the undersigned to Respondent dated January 31, 1989 in response to Exhibit 3(h). This letter, setting forth

the detailed requirements for a sufficient answer to a backpay specification, providing the requested relevant Board Regulations, and setting a second deadline by which a sufficient answer needed to be received in order to avoid the instant motion is directly relevant to the motion herein.

(n) Respondent's letter to Mercer dated January 31, 1989 in response to Exhibits 3(i) and (j). (highlighted) This letter reiterates the general denials earlier set forth.

(o) Respondent's letter to Albright dated January 31, 1989 in response to Exhibits 3(a) and (k). (Collateral relevance only.)

(p) Respondent's letter to Mercer dated February 1, 1989. (Collateral relevance only.)

(q) Letter from Mercer to Respondent dated February 6, 1989 in response to Exhibits 3(n), (o) and (p). (Collateral relevance only.)

(r) Letter from the undersigned to Respondent dated February 7, 1989 in response to Exhibit 3(p). (Collateral relevance only.)

(s) Letter from Respondent to the undersigned dated February 9, 1989.

4. Despite the deadlines set by the Specification and by Exhibits 3(e) and (m), and despite the representation made by Exhibit 3(s); as of this date, Respondent has still failed to file any answer to the Backpay Specification beyond the general denials contained in the body of the letters to the Regional Attorney referenced above.

Further, affiant sayeth not.

_____

James C. Sand

Appendix O
Board's March 21, 1991, Brief to the United States Court of Appeals for the Ninth Circuit, (No. 90-70612), pp. 15-16

. . . where employer's decision to lay off employees and subcontract their work though economically motivated was unilateral); Local 512 Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 719-20 (9th Cir. 1986) (backpay appropriate where employer unilaterally laid off employees immediately before, and during the months after, the employees elected a union); NLRB v. Adair Standish Corp. 912 F.2d 854, 864 (6th Cir. 1990) (employer's unilateral layoff following its employees election of a representative contravened Section 8(a)(5) and was not a permissible continuance of the status quo"). See NLRB v. Katz, 369 U.S. 736, 746 (1962).

Assuming that all the laid off employees are entitled to backpay, the Company does not question that the Board properly calculated the backpay amount due each employee In accord with its established backpay procedures.

Neither in its answer to the backpay specification nor anywhere else--including its brief to this Court--has the Company attempted to attack the General Counsel's gross backpay computations by identifying any particular employed or employees who might be entitled to less backpay by virtue of allegedly legitimate organizational or operational needs that would have led to those particular employees being laid off for some portion of their respective backpay periods even in the absence of the Company's unfair labor practices. Such an allegation would have been a typical affirmative defense to the backpay specification. See NLRB Casehandling Manual (Part Three) Compliance Proceedings, Section

10742 (1989). See also Dean General Contractors, 205 NLRB 573, 574-575 (1987) (noting that evidence concerning whether a backpay claimant's employment would have continued or been terminated for business reasons during the backpay period is the type of evidence that ordinarily would tend primarily to be in the possession of the respondent employer,' and that the employer, therefore, was to introduce such evidence in a backpay proceeding).

Rather than offer any specific facts to negative or mitigate the liability alleged in the General Counsel's backpay specification, the Company has relied on relentless assertions, renewed here (Br 9, 21), that the General Counsel failed to prove that any employees had suffered losses due to the Company's unfair labor practices. The Board reasonably declined to cast this burden upon the General Counsel, given the underlying decisions requiring that all of the laid off employees were to be reimbursed for the

amounts they lost due to the Company's unlawful layoff and discriminatory recall. Rather, the Board settled the issues in this case in full accord with its established regulations requiring specific answers to backpay specifications and requiring the employer to provide adequate evidence in support of its alleged affirmative defenses. See above, pp. 7-8 n. 4, 13-14 & n.6.

Before this Court, the Company does not challenge the propriety of the Board's established rules and procedures. Rather, it characterizes (Br 21) its defense as based solely on a . . .

Appendix P
Demand letter from Raymond D. Willms, Compliance Officer, NLRB, to Kenneth Joel Haber, Esq., Counsel to Petitioner, dated January 22, 1992, with its Appendix A, Owed Backpay and Interest

January 22, 1992

Kenneth Joel Haber, Esq.
Law Office of Kenneth Joel Haber, PC
17033 Briardale Rd.
Rockville, Maryland 20855

Re: USA MCDONALD CORPORATION
d/b/a NORCO PRODUCTS
Cases 19--CA--18986, --19184

Dear Mr. Haber:

You have recently received the Judgment of the United States Court of Appeals for the Ninth Circuit, dated December 16, 1991, which enforces the Supplemental Decision and Order of the National Labor Relations Board, dated August 28, 1990. in that Order, the Board adopted the Supplemental Decision of the Administrative Law Judge which set forth the amount of backpay owed 15 individuals and also directed that interest be paid under New Horizonsfor the Retarded, 283 NLRB 1173 (1981). On appendix A attached hereto, I have included interest that is payable if payment is made by February 15, 1992. Should payment

not be made by that date, additional amounts will be owed.

Checks should be made payable to each individual claimant (except for Butcher and Gates - see below) and sent to our office for distribution. Standard payroll deductions should be taken from the backpay, but not interest Portion of the payment. An itemization of the deductions should be included with the payment. Respondent should also send to this office a check in the amount of $86.40 (see attached Bill of Costs) made payable to the National Labor Relations Board.

Checks for Butcher and Gates plus interest should be made payable to the National Labor Relations Board which shall hold the funds in escrow under the conditions described in the decision of the Administrative Law Judge. The Employer should also include its share of FICA on these escrow amounts. If and when the final amounts to be distributed to these individuals is settled, our national office will issue checks in the appropriate amounts

after deductions and it will remit the correct amounts of FICA including the Employer's share to the appropriate agency. Any excess funds remaining (as a result of any interim earnings being discovered or our failure to locate either individual within a year after the escrow is set up) will be returned to the Employer.

Please do not hesitate to call if you have questions concerning the payments.

Very truly yours,

Raymond D. Willms
Officer

enclosures:
Owed Backpay And Interest (through 2/15/92)
Bill of Costs

cc: USA McDonald Corporation
Attn: James M. McDonald, President Ronald Preston, Operations Mgr. 5000 Lower Blue Mountain Road P. 0. Box 4227
Missoula, MT 59806

Teamsters Local No. 2
727 West Central
P. 0. Box 8144
Missoula, MT 59807

Tim McKittrick, Attorney
McKittrick Law Firm
410 Central Ave., Suite 622 P. 0. Box 1184
Great Falls, MT 59403

USA USA McDONALD CORPORATION d/b/a NORCO PRODUCTS
Case 19—CA—18986; 19184

OWED BACKPAY AND INTEREST - - INTEREST COMPUTED THROUGH 2/15/92.

	Name	1-87		2-87		3-87		TOTALS		
		Backpay	Interest .5074	Backpay	Interest .4849	Backpay	Interest .4624	Backpay	Int.	ALL
1	Bauer, Joseph	-	0	874	424	460	213	$1334	$637	$1971
2	Shapdelaine, Ronald	-	0	760	369	549	254	$1309	$622	$1931
3	Green, Scott	747	379	1890	916	-	0	$2637	$1295	$3932
4	Hambley, Kathy	648	329	757	367	-	0	$1405	$696	$2101
5	Hambley, Roger	818	415	1251	607	-	0	$2069	$1022	$3091
6	Harris, Richard	632	321	693	336	-	0	$1325	$657	$1982
7	Johnke, Ken	627	318	1107	537	-	0	$1734	$855	$2589
8	Martin, Don	689	350	1620	786	-	0	$2309	$1135	$3444
9	Martin, Patty	793	402	2939	1,425	0	0	$3732	$1827	$5559
10	Quinn, Kelly	610	310	1503	729	-	0	$2113	$1038	$3151
11	Rodriquez, Steve	647	328	1638	794	-	0	$2285	$1123	$3408
12	Trimp, Gary	659	334	1743	845	-	0	$2402	$1180	$3582
13	Yelton, Tom	737	374	347	168	-	0	$1084	$542	$1626
14	Butcher, Ron	666	338	1764	855	-	0	$2430	$1193	$3623
15	Gates, Jim	604	306	1599	775	-		$2203	$1082	$3285
	TOTALS :	$8877	$4504	$20485	$9933	$1009	$467	$30371	$14904	$45275

Appendix Q
Provisions Involved

(1) National Labor Relations Act, as amended (29 U.S.C. 151 et seq.):

(a) Section 8(a)(1), (3), and (5), as amended, 61 Stat. 140, as codified in 29 U.S.C. 158 (a) (1), (3), and (5) (in relevant part):

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

.....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...;

.....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Section 10(3), as codified in 29 U.S.C. 160(e):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such

additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the records with it the jurisdiction of the court shall be

exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United State court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(c) Section 10(f), as codified in 29 U.S.C. 160(f):

Any person aggrieved by a final order of the Board granting or denying on whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written

petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact is supported by substantial evidence on

the record considered as a whole
shall in like manner be conclusive.

(2) Rule 16, Fed. Rules of Appellate Procedure

(a) **Composition of the Record.** The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(b) **Omissions from or Misstatements in the Record.** If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that

the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.